DOCKET

No. 07-772

Title:	Doug Waddington, Superintendent, Washington Corrections Center, Petitioner v. Cesar Sarausad
Docketed:	December 11, 2007
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(05-35062)
Decision Date:	March 19, 2007
Rehearing Denied:	September 10, 2007

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 7 2007	Petition for a writ of certiorari filed. (Response due January 10, 2008)
Dec 7 2007	Appendix of Doug Waddington, Superintendent, Washington Corrections Center filed.
Jan 3 2008	Order extending time to file response to petition to and including February 11, 2008.
Feb 5 2008	Brief of respondent Cesar Sarausad in opposition filed.
Feb 5 2008	Motion for leave to proceed in forma pauperis filed by respondent Cesar Sarausad.
Feb 20 2008	Reply of petitioner Doug Waddington, Superintendent, Washington Corrections Center filed.
Feb 27 2008	DISTRIBUTED for Conference of March 14, 2008.
Mar 17 2008	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Mar 17 2008	Petition GRANTED.
Apr 8 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 23, 2008.
May 23 2008	Joint appendix filed.
May 23 2008	Brief of petitioner Doug Waddington, Superintendent, Washington Corrections Center filed.
Jun 9 2008	SET FOR ARGUMENT ON Wednesday, October 15, 2008.
Jun 10 2008	Motion to appoint counsel filed by respondent Cesar Sarausad. (CL Page 158)
Jun 20 2008	The time to file respondent's brief on the merits is extended to and including August 6, 2008.
Jun 25 2008	Motion DISTRIBUTED for Conference of September 29, 2008.
Jul 17 2008	CIRCULATED
Jul 31 2008	Record received from U.S.C.A. for the 9th Circuit. (2 boxes) (U.S.D.C.

record included)

Aug 4 2008	The time within which to file respondent's brief on the merits is further extended to and including August 20, 2008.
Aug 7 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Aug 18 2008	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
Aug 18 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from cunsel for the petitioner.
Aug 20 2008	Brief of respondent Cesar Sarausad filed. (Distributed)
Aug 27 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Sep 19 2008	Reply of petitioner Doug Waddington, Superintendent, Washington Corrections Center filed. (Distributed)
Oct 6 2008	Motion to appoint counsel filed by respondent GRANTED. Patricia Novotny, Esquire, of Seattle, Washington, is appointed to serve as counsel for the respondent in this case.
Oct 15 2008	Argued. For petitioner: William B. Collins, Deputy Solicitor General, Olympia, Wash. For respondent: Jeffrey Fisher, Stanford, Cal.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
07-772 DEC 7 - 2007
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Washington Supreme Court has repeatedly approved of the pattern accomplice liability jury instructions given in Sarausad's trial, which mirror the statutory language on accomplice liability under state law. The United States Court of Appeals for the Ninth Circuit found a violation of due process based its independent conclusion that the instructions were ambiguous, and that there was a reasonable likelihood a jury could misapply the instructions so as to relieve the prosecution of its burden to prove each element of a crime beyond a reasonable doubt.

1. In reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law governing accomplice liability?

2. Where the accomplice liability instructions correctly set forth state law, is it an unreasonable application of clearly established federal law to conclude there was no reasonable likelihood that the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all the elements of the crime?

PARTIES

The petitioner is Doug Waddington, the Superintendent of the Washington Corrections Center. Mr. Waddington is the successor in office to Carol Porter, who was the respondent-appellee in the Ninth Circuit, and he is substituted pursuant to Supreme Court R. 35.3. The respondent is Cesar Sarausad.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Doug Waddington, the Superintendent of the Washington Corrections Center, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Sarausad v. Porter,* 479 F.3d 671 (9th Cir. 2007) (Pet. App. 31a-124a). The order denying a timely petition for rehearing *en banc*, and the dissent from the denial of rehearing, is reported at 503 F.3d 822 (9th Cir. 2007) (Pet. App. 1a-30a). The order of the United States District Court for the Western District of Washington, and the report and recommendation of the United States Magistrate Judge are unpublished. Pet. App. 125a-133a, and Pet. App. 134a-188a. The opinion of the Washington Court of Appeals denying Sarausad's post-conviction collateral challenge is reported at *In re Sarausad*, 109 Wash. App. 824, 39 P.3d 308 (2001) (Pet. App. 195a-230a). The opinion of the Washington Court of Appeals affirming Sarausad's convictions on direct appeal is unpublished. Pet. App. 233a-267a.

JURISDICTION

The court of appeals first entered its opinion on March 7, 2007. Pet. App. 31a. The circuit court denied a timely petition for rehearing *en banc* on September 10, 2007. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The fifth amendment to the United States Constitution provides, in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.

The fourteenth amendment to the United States Constitution similarly provides, in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(e)(1) provides:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

Washington's accomplice liability statute, Wash. Rev. Code § 9A.08.020, provides in relevant part:

> "(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> . . .
>
> (c) He is an accomplice of such other person in the commission of the crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it. . . ."

STATEMENT

Respondent Cesar Sarausad drove a car filled with fellow gang members to a high school in order to retaliate against a rival gang. With knowledge that his front seat passenger, Brian Ronquillo, was armed and going to shoot, Sarausad drove towards a group of students standing outside the school, and slowed his car. Ronquillo fired several shots towards the students, killing one and wounding another student. A jury convicted Sarausad of second degree murder, second degree attempted murder, and second degree assault based upon accomplice liability. The jury instructions on accomplice liability, which mirrored the state statute, have been affirmed by the Washington courts as properly reflecting state law. The Ninth Circuit, over the dissent of one panel judge and the dissent of five judges who would have granted rehearing *en banc*, found the instruction ambiguous with regard to accomplice liability under state law. Finding a reasonable likelihood that the jury would apply the instructions in a manner that would relieve the prosecution of its obligation to prove all the elements of the crime, the Ninth Circuit affirmed the grant of habeas relief, vacating Sarausad's convictions.

1. The Events Of The Shooting

Sarausad was a member of a gang called the 23rd Street Diablos. On March 23, 1994, a fellow gang member, Jerome Reyes, told Sarausad and others that a few days earlier he had been chased away from Ballard high school by a rival gang. Sarausad considered the rival gang to be "his enemy." Sarausad, Reyes, Ronquillo and six other

"Diablos" drove in two cars to the high school to seek revenge against the rival gang, with Sarausad driving his car. After a brief encounter at the school involving shoving, "gang signs," harsh words, and the display of a gun by one of the Diablos, the Diablos heard the police were coming and they left.

After leaving the school, Sarausad and his fellow Diablos went to the home of a friend. They were angry at what happened, and felt they had appeared "chicken" for leaving the school. Sarausad left the house to get Michael Vincencio, the gang member known as the keeper of the gun. Vincencio carried the murder weapon back to the house, and gave it to Ronquillo. The group then decided to return to the school. Sarausad again drove the lead car with Ronquillo, armed with the gun, sitting next to him. Reyes and two other Diablos sat in the back seat. Vincencio and four others gang members followed in Vincencio's car.

On the return trip to the school, everyone in the car, including Sarausad, discussed the possibility of shooting. As the two cars neared the school, they moved side by side. Sarausad said, "Follow us," "Are you ready?" or "Ready." Sarausad then drove his car towards the students standing in front of the school. He drove quickly, "swooping down" on the kids, and slowed as the shots were fired. Sarausad admitted at trial that as he drove toward the students, he saw Ronquillo wearing a bandana tied over his nose and mouth, and saw him pull the gun out of a bag. Ronquillo aimed the gun out the window and fired between six to ten times, directly at the students. Two students ducked and avoided the shots, but a

bullet hit Melissa Fernandes in the head, killing her. Another student was injured by a bullet fragment.

Sarausad expressed no shock or surprise at Ronquillo's actions. Instead, once the shooting stopped, Sarausad sped away followed by the other vehicle. Sarausad and the others supported Ronquillo as they drove away. After some distance, Ronquillo transferred the gun to a hiding place in Vincencio's car. Sarausad then drove to a local mall to "lay low," and play video games. At the mall, Sarausad threw away a bullet shell from his car. Sarausad eventually went home, and tried to figure out an excuse for the police. When arrested later that day, Sarausad repeatedly lied to the police, denying he had even been at the school that day.

2. Accomplice Liability In Washington

Under Washington law, an accomplice is guilty to the same extent as the principal in a crime. Wash. Rev. Code § 9A.08.020(1)-(2) (Pet. App. 274a). An accomplice is defined as someone who "aids or agrees to aid such other person in planning or committing" the crime charged. Wash. Rev. Code § 9A.08.020(3) (Pet. App. 274a). Accomplice liability requires proof the person acted "[w]ith knowledge that it will promote or facilitate the commission of the crime" for which the accomplice is charged. Wash. Rev. Code § 9A.08.020(3) (Pet. App. 274a).

The Washington Supreme Court addressed the knowledge element of accomplice liability, and the proper jury instruction for accomplice liability, in *State v. Roberts*, 142 Wash.2d 471, 512, 14 P.3d 713 (2000). *Roberts* held the accomplice statute does not impose strict liability on an alleged accomplice for

any crime that might be committed by a putative principal. *Id.* at 510. The statute imposes a mens rea requirement that the accused act with knowledge that he is facilitating "the crime," which means the charged offense. *Roberts*, 142 Wash.2d at 510. However, the mens rea element of knowledge does not require that the accomplice share the same mental state as the principal. In Washington, the "long-standing rule [is] that an accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *Id.* at 512 (citing *State v. Sweet*, 138 Wash.2d 466, 479, 980 P.2d 1223 (1999); *State v. Hoffman*, 116 Wash.2d 51, 104, 804 P.2d 577 (1991)). "[W]here criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice's *general knowledge of his coparticipant's substantive crime.*'" *Roberts*, 142 Wash.2d at 512 (emphasis in original) (quoting *State v. Rice*, 102 Wash.2d 120, 125, 683 P.2d 199 (1984)).

Applying these principles, *Roberts* disapproved an instruction which required only that the accomplice act with knowledge that he promoted or facilitated the commission of "a crime." *Roberts*, 142 Wash.2d at 512-13. *Roberts* found the "a crime" instruction improperly departed from the language of the statute. *Id.* at 511. *Roberts* specifically approved an instruction with one significant difference. *Roberts* held an instruction is proper if it requires the jury to find "the accomplice acted 'with knowledge that it will promote or facilitate the commission of *the crime. . . .*'" *Id.* at 512 (emphasis in original) (quoting jury instruction in *State v.*

Davis, 101 Wash.2d 654, 656, 682 P.2d 883 (1984)); *see also State v. Cronin*, 142 Wash.2d 568, 579, 14 P.3d 752 (2000). *Roberts* held the proper instruction would copy "exactly the language from the accomplice liability statute" found at Wash. Rev. Code § 9A.08.020(3). *Roberts*, 142 Wash.2d at 512.

3. Trial Court Proceedings

Sarausad was tried with Ronquillo and Reyes for the first degree murder of Melissa Fernandes, for the attempted first degree murders of two other students targeted during the shooting, and for the second degree assault on another injured student. Numerous witnesses, including experts on gangs, and many of the gang members themselves, testified to the events of the shooting. Ronquillo admitted to the shooting, but denied having premeditated intent to kill. Sarausad's defense was that he returned to the school expecting only shoving or a fist fight; he denied knowing that Ronquillo had armed himself. Sarausad also denied any discussion of shooting on the return trip to the school, and he claimed he did not see Ronquillo tie on the bandana.

The court instructed the jury concerning accomplice liability by quoting almost verbatim from the accomplice liability statute, Wash. Rev. Code § 9A.08.020. Instruction number 45 provided:

> "You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime." Pet. App. 270a.

Instruction number 46 provided, in pertinent part:

> "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime or
>
> (2) aids or agrees to aid another person in planning or committing the crime." Pet. App. 271a.

The jury convicted Ronquillo of premeditated first degree murder, and convicted Sarausad of the lesser-included offenses of one count of second degree (intentional) murder, two counts of attempted second degree murder, and second degree assault while armed with a firearm.

4. State Appellate Proceedings

The Washington Court of Appeals affirmed Sarausad's convictions on direct appeal, rejecting, *inter alia*, Sarausad's challenge to the accomplice liability instructions. Pet. App. 233a-267a. The court noted the instructions mirrored the accomplice liability statute. Pet. App. 256a-258a. But in rejecting the claim, the court also discussed too inclusive a standard for accomplice liability. In finding sufficient evidence to support the convictions, the court incorrectly stated that to convict Sarausad, the prosecution need not prove he knew Ronquillo had a gun, or that there was even a potential for gun play. Pet. App. 266a. The Washington Supreme

Court denied Sarausad's petition for review without comment. Pet. App. 231a-232a.

After the disposition of the direct appeal, the Washington Supreme Court issued *Roberts* and *Cronin*, addressing the mens rea element of accomplice liability, and reaffirming the proper instruction for accomplice liability under state law. *Roberts*, 142 Wash.2d at 509-13; *Cronin*, 142 Wash.2d at 579. Sarausad then filed a personal restraint petition, again challenging the accomplice liability instructions given at his trial. Recognizing that it had not correctly evaluated the issue on direct review, the Washington Court of Appeals again reviewed the jury instructions, this time applying *Roberts* and *Cronin*. Pet. App. 195a-230a.

The Washington Court of Appeals noted that to convict Sarausad as an accomplice, the jury had to find he acted with knowledge that his conduct would promote or facilitate "the crime" for which he was charged. Pet. App. 201a (citing *Roberts*, 142 Wn.2d at 513; *Cronin*, 142 Wn.2d at 579). The court noted that while the law does not impose strict liability for all crimes the principal might commit, "an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime." Pet. App. 202a. "'The crime' means the charged crime, but because only general knowledge is required, even if the charged crime is aggravated, premeditated first degree murder as it was in *Roberts*, 'the crime' for purposes of accomplice liability is murder, regardless of degree." Pet. App. 202a-203a. Rejecting Sarausad's argument that he must have possessed

the same mental state as Ronquillo to act as an accomplice, the Washington Court of Appeals ruled,

> "the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder." Pet. App. 204a.

The Washington Court of Appeals held the instructions given in Sarausad's trial complied with *Roberts* and the accomplice liability statute. Pet. App. 206a-207a. The instructions required the jury to find that Sarausad acted with knowledge that his conduct would promote or facilitate "the crime."

The state court also rejected Sarausad's claim that the prosecutor's "in for a dime, in for a dollar" argument had erroneously urged guilt based on lesser knowledge than required for accomplice liability, such as knowledge that the accused was facilitating a fist fight. Pet. App. 208a-209a. The state court found Sarausad misstated the record. Pet. App. 209a. The court found: "the prosecutor did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a fist fight, he nevertheless was guilty of murder." Pet. App. 213a. Instead, the prosecutor effectively argued that, in order to restore the gang's respect following the first confrontation, Sarausad and the other Diablos went to the high school on the second trip for

the purpose of shooting. Pet. App. 213a. Finally, the court found no prejudice even if the prosecutor's hypothetical scenarios were improper:

> "Sarausad was not prejudiced. This is *because the court properly instructed the jury as to the law of accomplice liability* and because the prosecutor made it crystal clear to the jury that the State wanted Sarausad found guilty of first degree murder, first degree attempted murder and second degree assault because he knowingly facilitated the drive-by shooting and for no other reason. Not once did the prosecutor suggest to the jury that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight[.]" Pet. App. 214a-215a (emphasis added).

"[N]othing that the prosecutor argued to the jury required a remedial or supplemental instruction from the trial court." Pet. App. 215a. The Washington Supreme Court again denied review, this time expressly agreeing with the lower court's conclusion that the instructions correctly informed the jury of Washington law governing accomplice liability. Pet. App. 191a.

5. Federal Court Proceedings

Sarausad sought a writ of habeas corpus under 28 U.S.C. § 2254. The magistrate judge recommended the court grant relief on two grounds. The magistrate judge concluded the evidence was insufficient, and also believed the jury instructions, in combination with other factors, unconstitutionally

relieved the State of its burden of proof. Pet. App. 134a-188a. The district court granted the writ on both grounds. Pet. App. 125a-133a. The State appealed, and Sarausad cross-appealed.

A divided panel of the Ninth Circuit affirmed in part the grant of the writ. It reversed the district court's ruling that the evidence was insufficient to support the convictions. Pet. App. 39a-53a. However, the court affirmed that "ambiguous jury instructions on accomplice liability, in combination with other factors, unconstitutionally relieved the State of its burden of proof of an element of the crimes with which [Sarausad] was charged." Pet. App. 32a. The Ninth Circuit faulted the instructions for not containing "an explicit statement that an accomplice must have knowledge of the actual crime the principal intends to commit." Pet. App. 69a.

Ignoring the state court determination that the instructions were correct under *Roberts*, the Ninth Circuit found the instructions were comparable to the instruction found invalid in *Roberts*. Pet. App. 70a. The Ninth Circuit found the instructions and statute itself were ambiguous because they could be understood to impose accomplice liability under an "in for a dime, in for a dollar" theory, contrary to the knowledge requirement of Washington law. Pet. App. 70a-71a.

The Ninth Circuit described the instructions as:

> "no less confusing than the statute itself. We therefore conclude that the jury instructions were, at the very least, ambiguous on the question of whether Sarausad could be convicted of murder and attempted murder on a theory of accomplice liability without proof beyond a reasonable doubt that Sarausad knew that Ronquillo intended to commit murder." Pet. App. 74a.

After finding the instructions ambiguous, the Ninth Circuit concluded there was a reasonable likelihood the jury applied the instructions in a way that violates the Constitution. Pet. App. 74a-78a. The Ninth Circuit found a constitutional violation based on: (1) its conclusion that there was thin evidence that Sarausad knew that Ronquillo intended to commit murder on the return trip to the school; (2) its finding that the prosecutor had in fact argued for accomplice liability contrary to state law by referring to "in for a dime, in for a dollar", and rejecting the state court finding about the argument; (3) the fact that the jury has requested clarification concerning accomplice liability; and (4) its conclusion that the state court of appeals misstated the record regarding the prosecutor's "in for a dime, in for a dollar" argument. Pet. App. 74a-78a.

Judge Bybee dissented from the panel opinion, stating that clearly established federal law did not put the Washington courts on notice that the jury instructions were ambiguous or allowed a violation of due process. Pet. App. 99a-101a. Judge Bybee noted that the majority misread *Roberts* and misunderstood the "critical" distinction making Sarausad's instruction consistent with state law.

Pet. App. 101a-108a. "[T]he majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts." Pet. App. 112a. Judge Bybee also noted the state courts had properly followed Supreme Court precedent because "the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction." Pet. App. 111a (quoting *Weeks v. Angelone*, 528 U.S. 225, 234 (2000)).

The Ninth Circuit denied the State's petition for rehearing *en banc*. Pet. App. 1a. Judge Callahan wrote for the five judges who dissented from the denial of rehearing. Pet. App. 2a-30a. Judge Callahan noted the panel majority's failure to follow the Washington Supreme Court's binding precedent on state law resulted in the misinterpretation of Washington law. Pet. App. 3a-7a. Judge Callahan recognized that, by rejecting the very instructions approved by the Washington Supreme Court, the panel majority issued an opinion that directly conflicts with the decision of the Washington Supreme Court. Pet. App. 7a-14a. Judge Callahan also recognized that, after improperly disregarding the state court analysis of state law, the panel majority failed to give proper deference to the state court under the standards of 28 U.S.C. § 2254(d). Pet. App. 14a-30a. As Judge Callahan stated, the panel majority

> "not only misinterprets Washington law but also refuses to accord the Washington courts the required deference required by well established precedent and basic principles of

> federalism. By doing so, the panel majority elevates what it considers to be a Washington state court's mistake in interpreting Washington state law into a constitutional violation. As a result of our lack of deference, our court takes the unprecedented step of rejecting a standardized state jury instruction that the Washington Supreme Court has expressly approved as correctly stating the limits of accomplice liability under state law." Pet. App 2a.

REASONS FOR GRANTING THE PETITION

This Court should grant the writ of certiorari and reverse the decision of the Ninth Circuit for two reasons.

First, the Ninth Circuit disregarded the state court determination of state law that the instructions given in Sarausad's trial properly instructed the jury as to accomplice liability under Washington law. The state courts determined that the jury instructions in question, which mirrored the statute except for one word, fully and correctly set forth the elements of Washington's accomplice liability statute. The Ninth Circuit improperly rejected this state court determination of state law, and substituted its own judgment for that of the state court. Then, based on an erroneous view of state law, the Ninth Circuit found an ambiguity in the instructions that simply did not exist. As a result, the Ninth Circuit decision presents a substantial conflict with state court decisions addressing the identical statute and accomplice liability instruction.

Second, having misconstrued state law and the jury instructions, the Ninth Circuit compounded its error by failing to give proper deference to the state court adjudication of Sarausad's federal claim. Despite the fact that the jury instructions were correct under state law, the Ninth Circuit concluded the instructions were so ambiguous that there was a reasonable likelihood the jury misapplied the instructions so as to relieve the prosecution of the burden of proving every element of the crime. But the Ninth Circuit failed to recognize that the state court could reasonably apply federal law and reach a contrary conclusion. The Ninth Circuit failed to give the proper level of deference owed to the state court adjudication of Sarausad's claim under 28 U.S.C. § 2254(d). In this fashion, the Ninth Circuit decision conflicts in principle with controlling decisions of this Court and the rulings of other circuit courts.

A. THE NINTH CIRCUIT REJECTED THE STATE COURT DETERMINATION OF STATE LAW, AND REACHED A DECISION IN DIRECT CONFLICT WITH THE DECISION OF THE WASHINGTON SUPREME COURT.

The Ninth Circuit found ambiguous the jury instructions on accomplice liability. However, it reached this conclusion only by disregarding the state court determination that the judge had correctly instructed the jury by giving the instructions approved by the Washington Supreme Court. By rejecting this determination of state law, the Ninth Circuit entered a decision in direct conflict with the decision of the Washington Supreme Court.

1. The Court has repeatedly emphasized "that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). The federal courts "are not at liberty to depart from the state appellate court's resolution of these issues of state law." *Hicks v. Feiock*, 485 U.S. 624, 629 (1988). A federal court errs if it disregards the state court's authoritative interpretation of state law. *Bradshaw*, 546 U.S. at 78.

The elements of state crimes are defined by state law. *See Patterson v. New York*, 432 U.S. 197, 210 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986); *Martin v. Ohio*, 480 U.S. 228, 232 (1987). As a result, "[s]tate judges are more familiar with the elements of state offenses than are federal judges." *Jackson v. Virginia*, 443 U.S. 307, 336 n.9 (1979) (Stevens, J., concurring in judgment). The federal courts "usually walk on treacherous ground when we explore state law, for state courts, state agencies, and state legislatures are its final expositors under our federal regime." *Brady v. Maryland*, 373 U.S. 83, 90 (1963) (footnote omitted). Since the elements of a state crime are established by state law, and the state courts are the ultimate expositors of state law, the state courts necessarily have the final word as to what constitutes the elements of a crime under a state statute. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Martin*, 480 U.S. at 235. The state court determination that an

instruction correctly sets forth all the elements of a state crime is a determination of state law binding on federal courts. *Bradshaw*, 546 U.S. at 76-78; *Mullaney*, 421 U.S. at 691.

2. Here, the state courts determined that the instructions given in Sarausad's trial fully and correctly set forth all of the elements of accomplice liability. The instructions mirrored the accomplice liability statute. The instructions differed from the statute only in that the statute used the word "it," while the instructions used the words "the crime." Compare Pet. App. 270a-271a with 274a. The pattern instructions given in Sarausad's trial had been approved by the Washington Supreme Court prior to the trial in *Davis*, 101 Wash.2d at 656-59, and were cited with approval following the trial in *Roberts*, 142 Wash.2d at 509-13. In denying Sarausad's collateral challenge to his convictions, the state courts specifically determined the instructions given in Sarausad's trial were a correct statement of state law, that fully set forth all of the elements of accomplice liability. Pet. App. 190a-230a. As Judge Callahan noted in her dissenting opinion, "No Washington court has ever disapproved of a jury instruction that tracked the exact language of section 9A.08.020." Pet. App. 11a. "Every decision examining the jury instructions given in Sarausad's case, as well as [Wash. Rev. Code] § 9A.08.020, has determined that the instruction adequately and properly informs the jury of the intent necessary to find criminal liability under Washington law." Pet. App. 12a-13a. The instructions did not omit an element of the offense, create a presumption, reduce the burden of proof, or shift the burden to the

defendant. Pet. App. 15a. "Washington law clearly holds that the jury instruction in this case was a proper statement of Washington's accomplice liability law." Pet. App. 13a.

3. The panel, however, conducted its own analysis of Washington law. Misunderstanding state law and the decisions of the Washington Supreme Court, the panel opinion concluded that instructions 45 and 46 in Sarausad's trial were "very similar" to the instructions later held invalid by the Washington Supreme Court in *Roberts* because the instructions began with reference to "a crime." Pet. App. 69a-70a. This reasoning is deeply flawed because the *Roberts* court unambiguously approved of the pattern instructions, as given in Sarausad's trial. *See Roberts*, 142 Wash.2d at 513.

Contrary to the panel's reasoning, the term "a crime" in the introductory sentence of instructions 45 and 46 is correct under Washington law. The statute itself uses the term "a crime" in the introductory sentence of the definition of an accomplice. Wash. Rev. Code § 9A.08.020. The statute uses the term "a crime" because the statute has potential application to all crimes codified under Washington law. In other words, a person may potentially be an accomplice to any crime committed in the state of Washington if that person acted as an accomplice to the commission of "the crime." Wash. Rev. Code § 9A.08.020; *Roberts*, 142 Wash.2d at 509-13. To recognize application of accomplice liability to all crimes committed in Washington, the statute and the instructions necessarily state that a person can be guilty of "a crime" when he or she acts as an accomplice in the commission of "the crime." Wash.

Rev. Code § 9A.08.020(1), (2)(c), (3). Contrary to the Ninth Circuit's conclusion, the use of "a crime" in the introductory sentence on instructions 45 and 46 correctly set forth Washington law.

As Judge Bybee noted in his dissent to the panel's majority opinion, the erroneous use of the phrase "a crime" discussed in *Roberts*, 142 Wash.2d at 509-13, did not exist in Sarausad's instructions. As the Washington Supreme Court determined in denying review in Sarausad's collateral challenge, instructions 45 and 46 correctly set forth Washington law on accomplice liability because the instructions "correctly instructed the jury that it could convict Mr. Sarausad of murder or attempted murder as an accomplice only if it found he knowingly aided in the commission [of] 'the' crime charged." Pet. App. 191a. The conclusion that instructions 45 and 46 correctly instructed the jury as to accomplice liability under state law is binding on the federal courts. The Ninth Circuit erred by rejecting the state court determination of state law. *Estelle*, 502 U.S. at 68; *Bradshaw*, 546 U.S. at 76.

4. The misinterpretation of state law also shows the flaw in the panel's conclusions that the state court should have gone beyond the language of the statute. The Ninth Circuit believed the judge had to explicitly instruct the jury that "an accomplice must have knowledge of the actual crime the principal intends to commit." Pet. App. 69a. But the Washington courts have held the accomplice need not share the same mental state as the principal, or have specific knowledge of every element of the crime committed by the principal. Pet. App. 201a-202a (citing *Roberts*, 142 Wn.2d at 513; *Cronin*, 142 Wn.2d

at 579). The instruction proposed by the Ninth Circuit exceeds the elements of accomplice liability under state law. For that reason alone, the Ninth Circuit's reasoning is deeply flawed.

The Ninth Circuit mistakenly believed an explicit statement beyond the plain language of the statute was necessary in light of this Court's decisions in *Staples v. United States*, 511 U.S. 600 (1994), *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Liparota v. United States*, 471 U.S. 419 (1985). But these cases dealt with the proper construction of federal statutes, not with the requirements of constitutional due process. *Staples*, 511 U.S. at 604-09; *Ratzlaf*, 510 U.S. at 138-49; *Liparota*, 471 U.S. at 423-34. The cases did not clearly establish a rule of constitutional law, binding upon the state courts, that requires the explicit statement found lacking by the Ninth Circuit.

The burden to demonstrate a constitutional error entitling a petitioner to habeas relief is especially heavy where the claim of error is based not upon an erroneous instruction, but upon "the failure to give any explanation beyond the reading of the statutory language itself. . . ." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). Washington law did not require anything more than the instructions given at Sarausad's trial. Pet. App. 112a (Bybee, J., dissenting) ("the majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts."). To convict Sarausad as an accomplice, Washington law required only that the jury find he acted with knowledge that his conduct would promote or facilitate "the crime" for which he was

charged. Pet. App. 201a-206a (citing *Roberts*, 142 Wash.2d at 513; *Cronin*, 142 Wash.2d at 579). The prosecution did not have to prove that Sarausad had specific knowledge of every element of the crime committed by the principal, Ronquillo. Pet. App. 202a. The prosecution did not have to prove Sarausad knew Ronquillo had the kind of culpability required for any particular degree of murder. Pet. App. 202a-204a. Washington law required only that Sarausad knew generally that he was facilitating a homicide. Pet. App. 204a-205a.

As the Washington courts determined, the instructions given in Sarausad's trial correctly informed the jury of the elements for determining accomplice liability. Nothing more was required. Because the Ninth Circuit disregarded the Washington courts' authoritative interpretation of Washington law, the petition for certiorari should be granted. *Bradshaw*, 546 U.S. at 78.

B. THE REFUSAL TO ACCEPT THE STATE COURT DETERMINATION OF STATE LAW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS.

A federal court sitting in habeas must accept as binding the state court determinations of state law. *Bradshaw*, 546 U.S. at 78. The Ninth Circuit has refused to accept the rulings of the Washington Court of Appeals and Washington Supreme Court that the jury instructions given in Sarausad's trial correctly set forth the elements of state law governing accomplice liability. The Ninth Circuit's decision conflicts with the approach taken by other circuit courts in similar situations.

1. In *Jamerson v. Secretary for the Dept. of Corrections*, 410 F.3d 682, 688-89 (11th Cir. 2005), the defendant was convicted in the beating death of a man outside a party. *Id.* at 684-86. Similar to Sarausad, Jamerson contended the jury instructions and the judge's answers to jury questions erroneously permitted the jury to convict him of second degree murder without a finding that he possessed the required state of mind. *Id.* at 688. Similar to Sarausad, Jamerson contended that the instructions incorrectly stated that if the jury found him guilty of *any* crime, the jury could find him guilty of second degree murder. *Id.* The Eleventh Circuit rejected this claim, concluding the instructions correctly stated the law, and therefore did not violate due process. *Id.* In reaching this conclusion, the Eleventh Circuit, unlike the Ninth Circuit, accepted the state court determination, and did not conduct its own independent review of the instructions and Florida law.

2. In *Priester v. Vaughn*, 382 F.3d 394, 402 (3rd Cir. 2004), the Third Circuit rejected a similar challenge to an accomplice liability instruction because the state court had determined the instruction correctly set forth state law. Similar to Sarausad, Priester and fellow gang members drove in two cars to a local park intending to confront individuals who had attacked one of their friends. *Id.* at 396. Like Sarausad, Priester drove one of the cars, and at one point along the way, Priester pulled alongside the other car containing his fellow gang members, and said, "When we get up there, no questions asked, start busting." *Id.* When Priester and his fellow gang members found their target, Priester handed a gun to another gang member. *Id.*

That gang member subsequently fired into the crowd, killing one and injuring two others. *Id.*

Priester was convicted based upon an accomplice instruction. *Priester*, 382 F.3d at 396. In federal court, Priester alleged his counsel was ineffective for not objecting to the instruction. *Id.* at 401. Unlike the Ninth Circuit in this case, the Third Circuit held that federal courts cannot reexamine state court determinations of state law in the context of asking whether counsel's failure to object to the instructions violated the right to effective counsel. *Id.* at 402. The Third Circuit said, "This is particularly true in the instant case because the issue of appropriate jury instructions on accomplice liability in first-degree murder trials has been squarely addressed by the Pennsylvania Supreme Court." *Id.* (citing cases). Thus, contrary to the Ninth Circuit, the Third Circuit correctly recognized it was bound by the state court determination that the instruction comported with state law. *Id.*

3. In *Rael v. Sullivan*, 918 F.2d 874 (10th Cir. 1990), Rael challenged his convictions for extortion, alleging the instruction defining extortion omitted an essential element of the crime. *Id.* at 875. In denying relief, the Tenth Circuit noted the substantive elements of extortion are defined by state law. *Id.* at 875-876. The Tenth Circuit also noted the interpretation of the extortion statute given by the New Mexico Supreme Court was binding on the federal courts. *Id.* at 876. The instruction given in Rael's case was substantially similar to the state uniform jury instruction, which had been adopted by the state supreme court and approved on appeal by the state appellate courts.

Rael, 918 F.2d at 876. Contrary to the Ninth Circuit's decision here, the Tenth Circuit held: "Given the adoption and use of this instruction by the courts of New Mexico, we are not at liberty to find that the elements of extortion are different than those set forth by that state's court." *Id.* at 877. The Tenth Circuit added, "In the absence of any indication to the contrary, we cannot assume that the elements of extortion are different than those set forth in the instructions approved by New Mexico's courts." *Id.* at 877; *see also Parker v. Scott*, 394 F.3d 1302, 1319 (10th Cir. 2005) (rejecting the argument that state law included an additional element not found by the state courts); *Diguglielmo v. Smith*, 366 F.3d 130, 137 (2nd Cir. 2004) (recognizing the federal court is not empowered to second guess a state court ruling that the instructions properly set forth New York law).

C. THE NINTH CIRCUIT FAILED TO GIVE PROPER DEFERENCE TO THE STATE COURT ADJUDICATION OF FEDERAL LAW.

The Ninth Circuit found a reasonable likelihood that the jury misapplied the jury instructions so as to relieve the prosecution of the burden of proving every element beyond a reasonable doubt. However, the instructions did not omit an element of the offense. Nor did the instructions create a presumption of fact, or shift the burden of proof to the defendant. Therefore, the instructions did not violate due process, and the state court decision that the jury was properly instructed regarding accomplice liability under state law was not contrary to or an unreasonable application of clearly established federal law. By granting relief

under these circumstances, the Ninth Circuit failed to give proper deference to the state court adjudication.

1. Federal courts owe a high level of deference to state court adjudications under 28 U.S.C. § 2254(d). *See, e.g., Brown v. Payton*, 544 U.S. 133, 141-47 (2005); *Bell v. Cone*, 543 U.S. 447, 455 (2005); *Middleton v. McNeil*, 541 U.S. 433, 437-38 (2004) (per curiam). The statute "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). The statute requires the petitioner show not only a constitutional error, but that the state court decision was objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

In reviewing whether an allegedly ambiguous jury instruction violates due process, this Court "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Estelle*, 502 U.S. at 72-73. "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id.* at 73.[1]

2. As shown above, state law demonstrates that there was not an erroneous instruction that could be considered ambiguous. The Ninth Circuit,

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[1] Petitioner has found no case where this Court has held that an instruction which correctly sets forth state law, and which does not create a presumption or shift the burden of proof, violates due process.

however, faulted the state court for not providing additional instructions concerning accomplice liability. Where a due process claim is based on the lack of an additional instruction, the petitioner has an "especially heavy" burden to show a constitutional error. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* The mere possibility that the jury might have reached a different verdict with an additional instruction "is too speculative to justify the conclusion that constitutional error was committed." *Id.* at 157. The Ninth Circuit ruling cannot be reconciled with *Henderson*. Even if the judge could have instructed the jury in greater detail, the lack of such instruction does not violate due process because "the Constitution 'entitles a criminal defendant to a fair trial, not a perfect one.'" *Jamerson*, 410 F.3d at 690 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). When Sarausad was convicted, there was no alternative instruction sanctioned by the Washington Supreme Court, so due process did not require the reading of some other instruction. *Henderson*, 431 U.S. at 154-56.[2]

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[2] The Eighth Circuit relied on this Court's ruling in *Henderson* to reach a result that is at odds with the Ninth Circuit's ruling. *Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998). The Eight Circuit held due process did not require an additional instruction because no additional instruction had been approved by the state courts. This reflects another significant conflict raised by the Ninth Circuit's decision ordering additional instructions not otherwise called for by state law.

3. In evaluating whether the instructions may have misled the jury, the Ninth Circuit also relied on its finding and conclusion that the prosecution's closing argument misstated Washington law. Again, the Ninth Circuit incorrectly rejected a state court determination of state law. The state courts ruled that the argument properly reflected state law. Pet. App. 209a-214a. The state court found the prosecutor did not argue that Sarausad was liable for murder even if he merely thought Ronquillo intended a fistfight. Instead, based on the entire record, the state courts found the prosecutor had focused on Sarausad's knowledge that Ronquillo intended to shoot. Pet. App. 209a-214a. As the state court noted, the prosecutor argued:

> "'When they rode down to Ballard High School that last time, I say they knew what they were up to. They knew they were there to commit a crime, to disrespect the gang, to fight, *to shoot*, to get that respect back. A fist didn't work, pushing didn't work. Shouting insults at them didn't work. *Shooting was going to work.* In for a dime, you're in for a dollar.'" Pet. App. 212a (emphasis added).

The Ninth Circuit disregarded this state court conclusion of state law by claiming the state court had misstated the record and ignored portions of the prosecution's argument. Pet. App. 77a. However, a federal court cannot "presume so lightly that a state court failed to apply its own law." *Bell v. Cone*, 543 U.S. at 455. The state court conclusion that the prosecution's argument properly stated Washington law is binding on the federal courts. The Ninth

Circuit erred by disregarding this state court conclusion of state law. *Bradshaw*, 546 U.S. at 78.

Moreover, even the alleged misstatements of the law by the prosecutor cannot support the Ninth Circuit's ruling because of the flaws in its analysis of accomplice liability under state law and flawed rejection of the jury instructions. Standing alone, the prosecutor's argument violates no constitutional provisions because the prosecutor repeatedly referred to the instructions which correctly instructed the jury concerning accomplice liability. Pet. App. 209a-214a. The state court adjudication as applied to the prosecutor's arguments does not involve any unreasonable application of this Court's precedent. Instead, this Court has held that the "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Boyde v. California*, 494 U.S. 370, 384 (1990). Jurors are presumed to have followed their instructions and disregarded the argument to the extent the argument conflicted with the instructions. The Ninth Circuit thus erred in determining the prosecutor's argument caused the jury to misapply the correct jury instructions, and erred further by failing to defer to the state court's reasoned adjudication of this issue. *Id.* at 384-85; *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

4. The Ninth Circuit also concluded there was a reasonable likelihood that the jury misapplied the instructions because of the allegedly "thin evidence" in this case. Pet. App. 75a-76a. Again, the Ninth Circuit simply disregarded the state courts' analysis of the evidence, and concluded that the state court had overstated the strength of the prosecution's case. Pet. App. 75a. Essentially, the Ninth Circuit

gave no deference to the state court's view of the evidence. The state court correctly determined the record allowed the jury, properly applying the instructions, to find that Sarausad knowingly aided in the commission of murder by driving the car from which Ronquillo, a fellow gang member, shot the victims.

The shooting was revenge against a rival gang, whom Sarausad considered to be his "enemy." After earlier embarrassments, Sarausad and his gang went back to the school intending to restore the respect. Prior to driving to the school, Sarausad went to get Vincencio, the gang member who was known as the "keeper of the gun." When Vincencio returned with Sarausad, Vincencio had the loaded gun, which he gave to Ronquillo. The gang members then drove back to the high school. Sarausad drove the lead car and Ronquillo, armed with the gun, sat next to him. Sarausad and the others in the car discussed the possibility of shooting the rival gang. Sarausad drove in a manner that facilitated a drive-by shooting, driving quickly at first to "swoop down" upon the kids, and slowing as the shots were fired. Sarausad admitted that, while driving toward the kids, he saw Ronquillo's face was covered by a bandana, and he saw Ronquillo pull out the gun and aim it out the window. Sarausad expressed no shock or surprise; he did not tell Ronquillo to stop; he did not question what Ronquillo was doing, and instead continued driving toward the kids. Sarausad supported Ronquillo after the shooting and later helped to dispose of evidence. A review of the evidence does not mandate the conclusion that the jury misapplied the instructions.

5. Finally, the Ninth Circuit determined the inquiries by the jury during deliberations showed a reasonable likelihood that the jury misapplied the accomplice liability instructions contrary to due process. Pet. App. 76a-77a. However, when the jury submitted inquiries regarding accomplice liability, the judge correctly responded to the jury's inquiries by referring the jury to instructions 45 through 48. The response to the jury inquiries properly referenced the jury instructions that correctly set forth Washington law governing accomplice liability. The jury is presumed to have understood and followed the judge's response to the inquiries. *Weeks v. Angelone*, 528 U.S. at 234.

By concluding that an ambiguity and other factors created a reasonable likelihood that the jury misapplied the instructions, the Ninth Circuit too readily disregarded the state court's determination that the judge properly instructed Sarausad's jury and too easily found constitutional error. The Court should grant certiorari because the Ninth Circuit's failure to give the proper level of deference required under 28 U.S.C. § 2254(d) is inconsistent with the rulings of other circuits and the rulings of this court.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be reversed.

RESPECTFULLY SUBMITTED.

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December 10, 2007

APPENDIX

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Supreme Court, U.S.
FILED

07-772 DEC 7 - 2007

NO. (2) OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CESAR SARAUSAD, *Petitioner-Appellee,* v. CAROL PORTER, *Respondent-Appellant.*	No. 05-35062 D.C. No. CV-02-02547-JCC Western District of Washington, Seattle ORDER

Filed September 10, 2007

Before: Stephen Reinhardt, William A. Fletcher, and Jay S. Bybee, Circuit Judges.

Order; Dissent by Judge Callahan

ORDER

Judge Reinhardt and Judge W. Fletcher voted to deny the petition for rehearing en banc. Judge Bybee voted to grant the petition for rehearing en banc.

A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the non-recused active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f).

The petition for rehearing en banc, filed March 19, 2007, is DENIED.

The initial order concerning Petitioner Sarausad's custody is VACATED, and the district court is instructed on remand to decide whether Sarausad should remain in custody pending the state's decision to retry him.

CALLAHAN, Circuit Judge, with whom O'SCANNLAIN, GOULD, BYBEE, and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the denial of rehearing en banc because the panel majority fails to give the proper deference to the Washington Supreme Court's interpretation of Washington's accomplice liability statute. This is fundamentally a case about Washington state's right to define the parameters of accomplice liability under its own state law. The panel majority not only misinterprets Washington law but also refuses to accord the Washington courts the required deference required by well established precedent and basic principles of federalism. By doing so, the panel majority elevates what it considers to be a Washington state court's mistake in interpreting Washington state law into a constitutional violation. As a result of our lack of deference, our court takes the unprecedented step of rejecting a standardized state jury instruction that the Washington Supreme Court has expressly approved as correctly stating the limits of accomplice liability under state law.

The required deference to state court interpretations of state law was reinforced and supplemented by 28 U.S.C. § 2254(d)(1) after passage

of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The majority opinion simply ignores the Supreme Court's specific instructions in *Williams v. Taylor*, 529 U.S. 362, 410-13 (2000), on how to apply the highly deferential "contrary to" and "unreasonable application of" Supreme Court precedent standards from AEDPA. By avoiding analysis of why – in the face of Washington Supreme Court and Washington appellate court decisions affirming the jury instructions at issue and the principles concerning the limits of accomplice liability under Washington law – the state court decisions were objectively unreasonable applications of a specific Supreme Court holding, the panel majority fails to properly apply AEDPA.

1. The jury instruction was taken directly from the Washington complicity statute.

Central to our analysis is the language of Washington's complicity statute and the actual language of the jury instruction given in Sarausad's case. The Revised Code of Washington ("RCW") § 9A.08.020 codifies liability for complicity under Washington law. Section 9A.08.020, subsection (2) and (3) define accomplice liability, stating in relevant part:

> (2) A person is legally accountable for the conduct of another person when: . . .
>
> (c) He is an accomplice of such other person in the commission of the crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

During Sarausad's trial, the trial court gave Instructions 45 and 46 to explain accomplice liability. Instruction 45 stated:

> You are instructed that a person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *the crime*.

Sarausad v. Porter, 479 F.3d 671, 685 (9th Cir. 2007). Instruction 46 defined accomplice liability for the jury as follows:

> A person is an accomplice in the commission of *a crime* if, with knowledge that it will promote or facilitate the commission of *the crime*, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit *the crime* or
>
> (2) aids or agrees to aid another person in planning or committing *the crime*.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support

> or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Id. at 685 n.1 (emphasis added). There is no difference between the statute and the jury instruction, with the exception that the phrase "the crime" replaces the word "it" in the jury instruction.

II. The panel majority does not follow binding Washington Supreme Court precedent and fails to give the proper deference to the Washington Court of Appeals, resulting in a misinterpretation of Washington accomplice liability law.

As federal courts, we must accept that Washington's state courts correctly applied Washington laws. *Bell v. Cone*, 543 U.S. 447, 455 (2005). The panel majority fails to follow the fundamental principle of our federal system "that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *see also West v. AT&T*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law . . . ."). This principle applied to federal habeas review of state convictions long before AEDPA. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of

state law"). A federal circuit court errs if it interprets a state legal doctrine in a manner that directly conflicts with the state supreme court's interpretation of the law. *See Bradshaw*, 546 U.S. at 76-78 ("Because the Sixth Circuit disregarded the Ohio Supreme Court's authoritative interpretation of Ohio law, its ruling on sufficiency of the evidence was erroneous."). It does not matter that the state supreme court's statement of the law was dictum if it is perfectly clear and unambiguous. *Id.* at 76.

A determination of state law by a state appellate court is also binding in a federal habeas action. *See Hicks v. Feiock*, 485 U.S. 624, 629-30, 630 n.3 (1988) (noting state appellate court's determination of state law is binding and must be given deference). This is especially true where the highest court in the state has denied review of the lower court's decision. *Id.*; *see also West*, 311 U.S. at 237 ("This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court.").

This case illustrates exactly why these long-standing principles of deference and comity between the federal courts and the state courts exist – because interpreting state law is not a core function of the federal courts we lack the expertise to interpret state laws. More importantly, we lack authority to rewrite or reinterpret state law. "[O]nly state courts may authoritatively construe state statutes." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996); *see also Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the state's

highest court with respect to state law are binding on the federal courts."). It is axiomatic that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The states possess inherent law-making authority – both with respect to statutory and common law. *See New York v. United States*, 505 U.S. 144, 161 (1992) (holding that Congress may not commandeer the legislative processes of the States). When a state statute or common law conflicts with the United States Constitution, we will declare the state law to be null and void, but we have no authority to alter or reinterpret state law.

By ignoring the deference normally given to state court decisions concerning state law, we misinterpret Washington's accomplice liability statute and find a federal due process violation based on a phantom conflict between Washington Supreme Court and appellate court cases. A closer review of Washington case law reveals that the state appellate court's opinion in this case is consistent with a long line of authority approving of the jury instruction actually used in this case, and that the Washington courts have consistently approved of the jury instruction.

A. The panel majority comes to a conclusion directly contrary to Washington Supreme Court precedent and Washington state law.

The Washington Supreme Court expressly adopted the jury instruction at issue as a correct statement of Washington's accomplice liability law in the very case the panel majority cites to overturn the

jury instruction. After Sarausad's trial and direct appeal, the Washington Supreme Court clarified the limits of Washington's accomplice liability law (Wash. Rev. Code § 9A.08.020) in *State v. Roberts*, 14 P.3d 713, 734-36 (Wash. 2000).[1] The Washington Supreme Court held that a jury instruction that "improperly departed from the language of the statute" created the possibility that a jury could impose strict liability on an accomplice for any acts by the principal so long as the accomplice knew the principal would commit "a crime."[2] *Id.* at 735-36.

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[1] The Washington Supreme Court also interpreted Washington's aggravated first degree murder statute (Wash. Rev. Code § 10.95.020), and held that "major participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder." *Id.* at 733. This brought Washington law in conformity with the Supreme Court precedent from *Emmund v. Florida*, 458 U.S. 782, 784-798 (1982) and *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

[2] The full text of the jury instruction in *Roberts*, as quoted in relevant part by the Washington Supreme Court read:

> You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *a crime*.
>
> A person is an accomplice in the commission of a crime, whether present at the time of its commission or not, if, with knowledge that it will promote or facilitate *its commission*, he either:
>
> (a) solicits, commands, encourages or requests another person to commit the crime; or

The Washington Supreme Court noted that RCW § 9A.08.020(3)(A) was patterned after Model Penal Code § 2.06(3)(a), and that the commentary required the accomplice to "'have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge'* and states, *'he will not be liable for conduct that does not fall within this purpose.'" Id.* at 735 (quoting Model Penal Code § 2.06 cmt. 6(b) (1985)). The Washington Supreme Court summarized its holding as follows:

> General knowledge of "the crime" is sufficient. Nevertheless, knowledge by the accomplice that the principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. Such an interpretation is contrary to the statute's plain language, its legislative history, and supporting case law.

Roberts, 14 P.3d at 736.

In reaching its conclusion that the jury instruction in *Roberts* was incorrect, the Washington Supreme Court distinguished and approved its prior reasoning in *State v. Davis*, 682 P.2d 883 (1984). The *Roberts* court noted that "the jury instruction in *Davis*, unlike the jury instruction here, copied exactly the language from the accomplice liability statute: it allowed for a conviction as an accomplice if the accomplice acted 'with knowledge that it will promote or facilitate the commission of the *crime* . . . .'"[3] *Roberts*, 14 P.3d at 736 (quoting jury

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(b) aids another person in planning or committing the crime.

Roberts, 14 P.3d at 735.

[3] The jury instruction in *Davis* read as follows:

instruction from *Davis*, 682 P.2d at 884-85); *State v. Allen*, 66 P.3d 653, 659 (Wash. Ct. App. 2003) ("*Roberts* expressly approved of the accomplice instruction in *State v. Davis* . . . ."). The *Roberts* court then reaffirmed "that *Davis* does not impose strict liability on accomplices for any and all crimes but merely reaffirms our long-standing rule that an accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *Roberts*, 14 P.3d at 736. In a companion case, *State v.* Cronin, 14 P.3d 752, 757-58 (Wash. 2000), the Washington Supreme Court followed *Roberts*, but also cited with approval *Davis* to support the idea that under state law, criminal liability for an accomplice may be imposed only as long as the defendant has general knowledge of "the crime" for which he or she was eventually charged.

Under the facts of this case, the panel majority correctly finds sufficient evidence that Sarausad was at least an accomplice to second degree murder.

> A person is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> > 1) solicits, commands, encourages, or requests another person to commit the crime; or
> >
> > 2) aids or agrees to aid another person in planning or committing the crime.
> >
> > The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and is ready to assist by his or her presence is aiding in the commission of the crime.

Davis, 682 P.2d at 884-85.

There were numerous discussions concerning returning to Ballard High School to intimidate the rival gang. *Sarausad*, 479 F.3d at 680-81. Sarausad drove to pick up the gang member who had a gun. *Id.* at 682. Witnesses testified that Sarausad circled the high school several times, and one of the occupants of his car displayed a gun. *Id.* Furthermore, Sarausad drove by the steps of the school, slowed down, and waited for Ronquillo to fire four to ten shots before speeding away. *Id.* at 675, 682. This is not a case where Sarausad was convicted of second degree murder relating to his aiding and abetting a fraud scheme or a petty theft; the type of strict liability for any crime that the Washington Supreme Court held was not contemplated by RCW § 9A.08.020. Thus, the distinction between "a crime" and "the crime" is not relevant in cases, such as this one, where the defendant was present and willing to facilitate the acts of the shooter. *See State v. Vincent*, 120 P.3d 120, 124-25 (Wash. Ct. App. 2005) (concluding passenger aided and abetted shooter in a drive by shooting).

No Washington court has ever disapproved of a jury instruction that tracked the exact language of section 9A.08.020. In fact, jury instructions identical to the one used in Sarausad's case have been expressly approved both before and after the *Roberts* decision.[4] In *State v. Moran*, 81 P.3d 122, 129-30

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[4] *See State v. O'Neal*, 109 P.3d 429, 441 (Wash. Ct. App. 2005) (analyzing this exact instruction and concluding that, "[h]ere, the instructional language at issue in *Cronin* does not exist because instruction 16 referred to 'the crime.' Instruction 16 did not misstate the law and Harry's argument fails"); *State v. Bockman*, 682 P.2d 925, 936-37 (Wash. Ct. App. 1984)

(Wash. Ct. App. 2003), the Washington Court of Appeals noted that the *defendant* proffered the exact same instruction used in Sarausad's case, and that "[t]he accomplice liability instruction Moran proposed, not the instruction the court gave, is the correct statement of the law of accomplice liability." The only instructions that Washington state courts have found deficient under *Roberts* have used the phrase "a crime" in a clause other than "A defendant is an accomplice in the commission of a crime . . . ."[5] In each of these cases, the "a crime" language in a clause explaining the required knowledge or acts of the defendant created the over-breadth error under state law.

Every decision examining the jury instruction given in Sarausad's case, as well as RCW § 9A.08.020, has determined that the instruction

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("There was no error as to the instruction concerning the mental state of the accomplice."); *see also Allen*, 66 P.3d at 659 (concluding there was no *Roberts* error where the instruction stated: "A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime.").

[5] *See State v. Evans*, 114 P.3d 627, 634 (Wash. 2005) ("with the knowledge that it will promote or facilitate the commission of *a crime*" and "aids or agrees to aid another person in planning or committing *a crime*"); *State v. Berube*, 79 P.3d 1144, 1147-49 (Wash. 2003) (same); *State v. Brown*, 58 P.3d 889, 893 (Wash. 2002) (same); *Cronin*, 14 P.3d at 756-57 (same); *Roberts*, 14 P.3d at 735 (after "a crime," "with knowledge that it will promote or facilitate *its commission*"); *In re Smith*, 73 P.3d 386, 392 (Wash. Ct. App. 2003) (same as *Evans*).

adequately and properly informs the jury of the intent necessary to find criminal liability under Washington law. The Washington Supreme Court expressly declared that the jury instruction given does not impose strict liability on defendants. *Roberts*, 14 P.3d at 736. Washington law clearly holds that the jury instruction in this case was a proper statement of Washington's accomplice liability law.

Yet the panel majority ignores both the statute and the cases approving of the jury instruction, in concluding that the Washington Supreme Court rejected a "very similar" instruction. *See Sarausad*, 479 F.3d at 690. The panel majority ignores the specific language from *Roberts*, 14 P.3d at 736, approving of the jury instruction used in Sarausad's case. *Id.* The majority takes the Washington Court of Appeals to task for *following* the Washington Supreme Court's decision in *Roberts* and approving the jury instruction language that copied RCW § 9A.08.020. *Id.* at 691. The Washington Court of Appeals, however, properly noted that the *Roberts* court relied upon language from the Model Penal Code commentary that an accomplice has "the purpose to promote or facilitate the *particular conduct that forms the basis for the charge.*" *In re Sarausad*, 39 P.3d 308, 315 (Wash. Ct. App. 2001). Directly quoting the reasoning of the Washington Supreme Court is neither improper for a Washington Court of Appeals, nor an improper application of state law. Therefore, the panel majority's conclusions directly conflict with the Washington Supreme Court's and the Washington appellate courts' decisions about the scope of accomplice liability and the propriety of the jury instructions in

Sarausad's case.

We must accept as binding the Washington Supreme Court's express approval of the instruction and the statute as accurate and proper statements of Washington's accomplice liability law. *Bradshaw*, 546 U.S. at 76-78. Having determined that there was no state law error from the use of the accomplice liability jury instruction in Sarausad's case, the question becomes whether RCW § 9A.08.020, by defining accomplice liability, violates the Due Process Clause by impermissibly shifting the burden of proof from the State to Sarausad.

B. Defining the limits of Washington state's accomplice liability law does not impermissibly shift any burdens under Winship.

The panel majority fails to cite to any authority that Washington's definition of accomplice liability violates a "fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses." *Clark v. Arizona*, __ U.S. __, 126 S. Ct. 2709, 2719, 165 L. Ed. 2d 842, 859 (2006); *see also Stanton v. Benzler*, 146 F.3d 726, 728 (9th Cir. 1998) (noting "a state is generally free within broad limits to define the elements of a particular offense" and shielding from habeas review a state law determination that arsenic trioxide is a poison as a matter of law). The Washington Supreme Court's pronouncement that the jury instructions approved in *Davis* are a correct statement that accomplice liability includes situations where the consequences are reasonably foreseeable (as opposed to imposing strict liability for any crime committed) should be conclusive. After all,

the last word on the parameters of Washington's accomplice liability law "belongs neither to us nor to the district court but to the supreme court of [Washington]." *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). Even *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991), the case relied upon by the majority opinion, recognized "the fact that the [jury] instruction was allegedly incorrect under state law is not a basis for habeas relief." Just because the panel majority feels that the Washington Court of Appeals' interpretation of the accomplice liability law to allow for foreseeable consequences as opposed to strict liability is incorrect does not justify the grant of habeas corpus. *See Duckett v. Godinez*, 67 F.3d 734, 744 (9th Cir. 1995) ("The fact that a jury instruction is inadequate by Ninth Circuit direct appeal standards does not mean a petitioner who relies on such an inadequacy will be entitled to habeas relief from a state court conviction.").

This is not a case where the burden of proof was something other than beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). Nor is this a case where the statute requires the defendant to prove a defense that negates an element of the crime or created a presumption concerning an element of the crime.[6] Rather, the burden remains on the habeas petitioner to show that accomplice

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[6] *See Francis v. Franklin*, 471 U.S. 307, 317 (1985) (holding mandatory, rebuttable presumptions regarding intent are unconstitutional); *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) (invalidating *Montana* instruction stating that a defendant is presumed to intend the consequences of their actions); *Mullaney*, 421 U.S. at 703-04 (finding Maine statute that required defendants to prove heat of passion by a preponderance of the evidence unconstitutional).

liability limits are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" in order to support a due process claim. *Montana v. Egelhoff*, 518 U.S. 37, 47 (1996) (internal quotation marks omitted). Sarausad has made no showing that some codification of complicity liability is a fundamental principle of criminal law, or deeply rooted, or that Washington's definition of accomplice liability somehow violates that principle. *See Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (discussing fundamental principles for the purposes of due process claims).

The Supreme Court has defined the category of jury instructions that violate "fundamental fairness" very narrowly. *See Estelle*, 502 U.S. at 72-73 (citing *Dowling v. United States*, 493 U.S. 342, 352 (1990)). In fact, the Supreme Court stated, that "[i]f a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." *Schad v. Arizona* 501 U.S. 624, 636 (1991). The Supreme Court in *Schad* rejected the idea that pursuing statutory, alternative theories of liability somehow impermissibly shifted the burden of proof from the state. *Id.* at 631-32.

The Washington Supreme Court has never interpreted RCW § 9A.08.020, or the jury instruction in *Davis*, as requiring a lesser standard of proof or creating a presumption concerning accomplice liability. In fact, the Washington Supreme Court reiterated that the prosecution is required to prove

beyond a reasonable doubt an intent to aid, abet, facilitate, etc. the particular act that constitutes the crime under RCW § 9A.08.020. *Cronin*, 14 P.3d at 758.

Despite the panel majority's citation to *In re Winship*, it fails to explain, as our cases require, which burden concerning accomplice liability the challenged instruction shifted from the state to the defendant. *See Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005) (noting that equal protection inquiry must be in "reference to the elements of the criminal offense as set forth by state law"). The panel majority fails to cite any Supreme Court case holding that an overstatement of accomplice liability impermissibly shifts the burden of proof from the prosecutor to the defendant. The only case discussing theories of liability, *Schad v. Arizona*, 501 U.S. at 631-32, rejected the idea that pursuing alternative theories of liability impermissibly shifted the burden of proof under *Winship* and *Mullaney*. The Washington Supreme Court's approval of the statute and the instruction as given in Sarausad's case, means that there was no *Winship / Mullaney* issue in this case because RCW § 9A.08.020 simply defined what was required to find accomplice liability. *See Stanton*, 146 F.3d at 728. Nothing about Washington's definition of accomplice liability, or the jury instruction concerning accomplice liability impermissibly shifted a burden from the prosecution to Sarausad. Accordingly, neither the Due Process Clause nor *Winship* and its progeny allow a federal court to hold that an ordinary definition of accomplice liability is unconstitutional.

C. The prosecutor's arguments were not improper statements in the context of the trial and Washington state law.

The panel majority makes much of the fact that the prosecutor argued an "in for a dime, in for a dollar" theory, insisting that the prosecutor's argument made the accomplice liability jury instruction unsound. *See Sarausad*, 479 F.3d at 684-85, 693. The majority fails to appreciate, however, that this was a proper argument concerning Washington's felony murder rule, an alternative theory charged against Sarausad. *See In re Sarausad*, 39 F.3d at 312 n.2 (noting all three defendants charged with the second degree felony murder of Melissa Fernandes); *see also State v. Wanrow*, 588 P.2d 1320, 1323-24 (Wash. 1978) (holding assault can serve as the predicate felony for a felony murder conviction).[7] Furthermore, the prosecutor's hypotheeticals: a person holding the arms of the victim during an assault and the driver for a bank robbery were based on state appellate court decisions about aiding and abetting liability.[8]

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[7] *State v. Wanrow* was reversed by *In re Andress*, 56 P.3d 981, 998 (Wash. 2002). The Washington Legislature then clarified that assault could be a predicate felony for felony murder in 2003. *See* 2003 Wash. Adv. Leg. Serv. Ch. 3 §§ 1-2.

[8] *See State v. Carothers*, 525 P.2d 731, 736 (Wash. 1974), disapproved on other grounds by *State v. Harris*, 685 P.2d 584, 587 (Wash. 1984) ("Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant."); *State v. Trout*, 105 P.3d 69, 75 (Wash. Ct. App. 2005) (finding sufficient evidence to convict as an accomplice where defendant knew about the plan to rob residents, armed the co-defendants, and was willing to

The prosecutor, by analogizing Sarausad's conduct of driving Ronquillo to the scene and slowing down to allow Ronquillo to fire at the victims to an accomplice who holds someone's arms while the principle beats the victim to death was not outside the bounds of accomplice liability. *See Roberts*, 14 P.3d at 735 (noting the Model Penal Code commentary that the accomplice must "have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*"). Finally, the prosecutor's arguments that Sarausad's participation as a driver throughout the act and afterward justified convicting him under Washington state law was a proper statement of aiding and abetting the murder. *See Vincent*, 120 P.3d at 124-25 (finding sufficient evidence of facilitation for passenger who served as a lookout and ducked so the driver could shoot out the passenger side window during a gang-related drive by shooting); *In re Smith*, 73 P.3d at 395, 397

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provide backup even though he intended to rob a person who wasn't at the apartment); *State v. Haack*, 958 P.2d 1001, 1003-04 (Wash. Ct. App. 1997) ("Where several people beat up on a victim at the same time and the victim suffers great bodily injury from the beating, it may not be possible for the State to prove which person was responsible for inflicting the life-threatening injury; it is sufficient to convict all of the participants if the State can prove that the life-threatening injury was inflicted by one or more of the participants during the beating and that at least one of the participants intended to inflict great bodily harm.").

In *Davis*, the Washington Supreme Court went further, stating that "the law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." 682 P.2d at 886. The Washington Supreme Court has not overruled or questioned *Davis* on this point.

(concluding defendant's willingness to continue driving co-defendant who robbed and kidnapped victims was sufficient evidence of facilitating the crimes).

Nothing in the prosecutor's argument stated that the prosecutor did not need to prove every element of the crime. Rather, the prosecutor's arguments presented legitimate theories of liability under Washington law.[9] There is no evidence that the trial court failed to properly instruct the jury that the burden was on the prosecution to prove all the elements of accomplice liability beyond a reasonable doubt. The panel majority's discussion of the prosecutor's argument is taken out of context, fails to consider alternative theories, and is based on the false premise that the jury instruction was erroneous. As a result, the prosecutor's comments may not be used to bolster a weak argument that an instruction that was a correct statement of state law was somehow erroneous or unconstitutional.

The panel majority's misinterpretation of Washington law could have been avoided by giving the Washington courts the proper deference. The opinion conflicts with binding Supreme Court

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[9] Under Washington law, "anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant." *Carothers*, 525 P.2d at 736. Aiding or agreeing to aid a person to plan or commit the charged crime is sufficient to make a defendant liable as a principal. *See State v. McDonald*, 981 P.2d 443, 449-50 (Wash. 1999) (analyzing accomplice liability under Washington law and concluding that there is no proximate causation requirement).

precedent mandating that we refrain from attempting to define elements of liability when the state supreme court has made a clear and unambiguous statement of what the applicable state law is. *Bradshaw*, 546 U.S. at 76-78; *see also Bains v. Cambra*, 204 F.3d 964, 972 (9th Cir. 2000) (stating standard of review and deference due to state supreme court cases interpreting state law). As a federal court, we should not expand our duties to rewrite state laws and jury instructions. Instead, we must defer to the specific pronouncements of the Washington Supreme Court, conclude that the jury instruction in this case properly stated the scope of Washington's accomplice liability law, and reverse the district court's grant of habeas corpus.

III. The panel majority fails to properly apply AEDPA's deferential requirements.

Even if the Washington Court of Appeals reached an incorrect conclusion about state law, this would not support the issuance of a writ under AEDPA. It also conflicts with our post-AEDPA burden of proof decisions in *Lambert v. Blodgett*, 393 F.3d 943, 973-76 (9th Cir. 2004) (applying deferential AEDPA standards to determinations by the Washington state courts), and *Bruce v. Terhune*, 376 F.3d 950, 955-56 (9th Cir. 2004) (applying AEDPA standards to a claim that witness credibility jury instructions lessened the burden of proof).

A. The AEDPA standards codified in 28 U.S.C. § 2254(d)(1) are mandatory and binding.

The majority's failure to apply AEDPA's "contrary to" or "unreasonable application of" clearly

established Federal law standard is clearly erroneous and conflicts with Supreme Court precedent mandating their application. AEDPA amended 28 U.S.C. § 2254 to restrict federal habeas corpus grants to state prisoners to cases where the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Section 2254(d)(1) creates two independent grounds for granting habeas relief to a state prisoner: (1) that the state court's determination was "contrary to" Supreme Court precedent, and (2) that the state court's decision was an "unreasonable application" of Supreme Court precedent. *See Williams*, 529 U.S. at 405 (approving of the Fourth Circuit's interpretation that § 2254(d)(1) contains two independent grounds for relief). Section 2254 sets forth a "highly deferential standard for evaluating state court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), that "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). The panel majority, however, fails to identify the specific ground for granting relief to Sarausad on his accomplice liability instruction claim. *Compare Sarausad*, 479 F.3d at 676-77 (stating the two-part standard) *with id.* at 689-94 (discussing the accomplice liability instruction without finding that the Washington Court of Appeals reached a result "contrary to" clearly established Supreme Court precedent or made an objectively "unreasonable application" of Supreme Court precedent).

1. The panel majority fails to make sufficient findings for granting habeas to support an argument that the Washington Court of Appeals decision was "contrary to" clearly established Federal law.

A finding that the state court decision was "contrary to" clearly established Supreme Court precedent, requires a determination that either "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]."[10] *Williams*, 529 U.S. at 405. The Supreme Court has never held that an accomplice liability statute, or any similar statute or jury instruction, was unconstitutional or impermissibly shifted the burden of proof from the state to the defendant. The Supreme Court has also not confronted facts that are materially indistinguishable from Sarausad's case. The majority's failure to identify any applicable precedent, or point to any part of the Washington Court of Appeals opinion that was directly contrary to Supreme Court precedent precludes reliance on the "contrary to" prong of § 2254(d)(1).

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[10] Clearly established Federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions." *Id.* at 412.

2. The panel majority failed to make sufficient findings to justify granting habeas because the state court decision was an unreasonable application of Federal law.

Assuming that the majority granted habeas based on an "unreasonable application" of Supreme Court precedent, then the majority's opinion fails to apply the Supreme Court's holding that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

The panel majority fails to conduct any

analysis under the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1). *See Sarausad*, 479 F.3d at 689-94. Because it does not contain any discussion of the legal principle involved, or why the Washington Court of Appeals' application of the principle was "objectively unreasonable," the majority's opinion fails to properly apply the AEDPA standards. *See Mitchell v. Esparza*, 540 U.S. 12, 15 (2003) (admonishing because "[t]he Court of Appeals, however, failed to cite, much less apply, this section"). The requirements of AEDPA deference are binding directions to accord deference. *See Uttecht v. Brown*, 551 U.S. at __, 127 S. Ct. 2218, 2224 (2007) (stating that the AEDPA requirements are "additional, and binding, directions to accord deference").

The Supreme Court in *Williams* gave specific directions to the federal courts on how to apply the "contrary to" and "unreasonable application" of Supreme Court precedent standards of AEDPA. Congress included that language specifically to prevent federal courts from granting habeas corpus by casually citing to broad language in Supreme Court opinions to justify overturning state court denials of habeas relief. The panel majority, however, does precisely that by pointing at broad principles from *In re Winship*, 397 U.S. at 364, *Sandstrom v. Montana*, 442 U.S. at 521, and *Estelle v. McGuire*, 502 U.S. at 72, and glossing over the analysis required by *Williams*, 529 U.S. at 405, 409-11. *See Sarausad v. Porter*, 479 F.3d at 683-84, 689-94 (failing to make findings under the two prongs of AEDPA). The findings and analysis under both prongs of AEDPA stated in *Williams* are mandatory, not optional. We should not be so

cavalier with the application of AEDPA when the Supreme Court has given us specific and detailed instructions on how to apply the deferential standards.

3. The Washington Court of Appeals' decision was objectively reasonable.

The majority opinion essentially argues that the jury instruction in this case was ambiguous because the Washington courts have come to conflicting results concerning the jury instructions for accomplice liability. *See Sarausad v. Porter*, 479 F.3d at 692. Sarausad has not, and cannot, demonstrate that the state appellate court's decision was objectively unreasonable.

As noted above, the Washington Supreme Court drew a clear line between permissible jury instructions that scrupulously follow RCW § 9A.08.020 and impermissible jury instructions that create the inference that a defendant can be strictly liable for any subsequent offense committed by his co-defendants if he aids and abets them in the commission of any crime.[11] *Roberts*, 14 P.3d at 736. Given the Washington Supreme Court's language expressly approving of *Davis* and the jury instruction that uses "the crime," instead of "a crime," the Washington Court of Appeals was well within the bounds of reason to conclude that the jury instruction in this case was an accurate statement of

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[11] Of course correct statements of state law and the burden of proof are not constitutionally erroneous. *See Bruce*, 376 F.3d at 956 (concluding that instructions that comport with *Winship* and state law were not constitutionally erroneous).

the law.[12] *See In re Sarausad*, 39 P.3d at 318. Subsequent cases following the court of appeals' reasoning in this case and concluding that jury instructions that follow the language of RCW § 9A.08.020 are correct, demonstrate that the state court's approach was objectively reasonable. *O'Neal*, 109 P.3d at 441; *Allen*, 66 P.3d at 659. Furthermore, the state court of appeals could properly hold that the limited nature of the prosecutor's argument in the circumstances of this case were within the bounds of Washington's accomplice liability law based on prior case law. *See Carothers*, 525 P.2d at 736; *Haack*, 958 P.2d at 1003-04. Nothing about the state court of appeals' decision makes it objectively unreasonable, much less an objectively unreasonable application of Supreme Court precedent. The Supreme Court has never disapproved of the Model Penal Code concerning accomplice liability, or any statute similar to RCW § 9A.08.020 as unconstitutionally ambiguous.[13]

The case was not before us upon direct review. We were required under *Williams*, 529 U.S. 409-413,

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[12] Considering the court of appeals relied upon the Washington Supreme Court's own language from *Roberts*, it is not surprising that the state supreme court refused to review the decision.

[13] The cases cited by the panel majority concerning ambiguous jury instructions concerned federal statutes on direct review, not state interpretations of state statutes. *See Liparota v. United States*, 471 U.S. 419, 424 (1985) (discussing 7 U.S.C. § 2024(b)(1)); *Staples v. United States*, 511 U.S. 600, 604 (1994) (26 U.S.C. § 5861(d)); *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (31 U.S.C. §§ 5322(a) and 5324(3)); *United States v. Speech*, 968 F.2d 795, 796 (9th Cir. 1992) (42 U.S.C. § 6928(d)(1)).

to analyze whether the court of appeals identified a correct principle under Supreme Court precedent but applied the principle in an objectively unreasonable manner. The panel majority failed to conduct this inquiry, and even under state law, cannot show that the state appellate court's analysis was objectively unreasonable. AEDPA was designed specifically to avoid unfettered review of the reasonableness of state court decisions. Sarausad has not demonstrated any objectively unreasonable application of Supreme Court precedent, therefore, under AEDPA, our duty was to deny his petition.

B. The majority's opinion engages in improper de novo review without giving the Washington Court of Appeals' legal conclusions about state law any deference in violation of Williams v. Taylor.

The majority's opinion improperly analyzes the jury instruction de novo and simply concludes that the Washington Court of Appeals' decision was incorrect, instead of identifying what legal principle the state court applied in an "objectively unreasonable" manner. By setting aside the Washington Court of Appeals' legal conclusion that the jury instruction given in Sarausad's case was a proper statement of Washington law, the panel majority conflicts with this court's opinion in *Lambert v. Blodgett*, 393 F.3d at 975-76, because it fails to find (and, as discussed above cannot find) that the state courts' legal conclusions were objectively unreasonable or contrary to established Supreme Court precedent. Rather, the panel majority proceeds to undertake what amounts to a

direct review of the allegedly improper jury instruction under *Estelle*, 502 U.S. at 71-72. *See Sarausad*, 479 F.3d at 689-94. The Supreme Court has reiterated time and time again after *Williams*, that a federal court cannot grant habeas relief by undertaking a de novo review and reaching a different conclusion than the state courts. *See Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004); *Woodford*, 537 U.S. at 24-25. Additionally, the majority's approach is improper because "[t]he fact that jury instruction is inadequate by Ninth Circuit direct appeal standards does not mean a petitioner who relies on such an inadequacy will be entitled to habeas relief from a state court conviction." *Duckett*, 67 F.3d at 744.

In this case, the majority, after independent review, simply disagrees with the Washington Court of Appeals, and fails to conduct a proper AEDPA based inquiry into the reasonableness of the legal determinations concerning the propriety of the jury instruction under Washington law.[14] The majority's failure to recognize that the Washington Supreme Court approved of the instruction given in this case as a correct statement of Washington law was directly contrary to Supreme Court precedent. *See Bradshaw*, 546 U.S. at 78 (holding that failure to credit Ohio Supreme Court's pronouncement that the doctrine of transferred intent applied to felony

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[14] Even if the Washington Court of Appeals was wrong in its application of Washington law, writs of habeas corpus are not available for alleged errors in the interpretation or application of state law. *Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993) (quoting *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985)).

murder by reaching the opposite conclusion was error). By deciding to conduct a de novo review of the jury instruction and Washington's accomplice liability law instead of applying the deferential AEDPA standards, the panel majority compounds its mistake and reaches a result contrary to Supreme Court and our own prece 'ents.

CONCLUSION

This case shows a lack of respect for the state courts that violates the principles of federalism and our traditional deference to the states' highest courts to interpret state law. The panel majority misinterprets Washington's accomplice liability statute and Washington Supreme Court case law concerning the accomplice liability jury instructions given in Sarausad's case. As a result, the entire premise of the panel majority's affirmance of the grant of habeas corpus is flawed. In addition, the panel majority's failure to follow the Supreme Court's instructions on how to apply AEDPA compounds its initial mistake in attempting to interpret Washington's accomplice liability statute. Finally, the panel majority's approach to the Washington Court of Appeals' harmless error analysis conflicts with our prior approach in *Medina v. Hornung*, 372 F.3d 1120, 1126 (9th Cir. 2004), and the Supreme Court's mandate in *Mitchell v. Esparza*, 540 U.S. at 17. Therefore, I dissent from our decision not to rehear this case en banc.

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CESAR SARAUSAD, *Petitioner-Appellee,* v. CAROL PORTER, *Respondent-Appellant.*	No. 05-35062 D.C. No. CV-02-02547-JCC

CESAR SARAUSAD, *Petitioner-Appellant,* v. CAROL PORTER, *Respondent-Appellee.*	No. 05-35192 D.C. No. CV-02-02547-JCC OPINION

Appeals from the United States District Court for the Western District of Washington

John C. Coughenour, Chief Judge, Presiding

Argued and Submitted

November 15, 2005–Seattle, Washington

Filed March 7, 2007

Before: Stephen Reinhardt, William A. Fletcher, and Jay S. Bybee, Circuit Judges.

Opinion by Judge William A. Fletcher; Partial Concurrence and Partial Dissent by Judge Reinhardt; Dissent by Judge Bybee

COUNSEL

John J. Samson, Office of the Washington Attorney General, Olympia, Washington, for the respondent-appellant.

Patricia S. Novotny, and David B. Zuckerman, Seattle, Washington, for the petitioner-appellee.

OPINION

W. FLETCHER, Circuit Judge:

Petitioner Cesar Sarausad brings a petition for habeas corpus under 28 U.S.C. § 2254, challenging his second-degree murder and two attempted second-degree murder convictions. We hold that the evidence was sufficient to support the convictions under *Jackson v. Virginia*, 443 U.S. 307 (1979). However, based on *In re Winship*, 397 U.S. 358 (1970), *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Estelle v. McGuire*, 502 U.S. 62 (1991), we hold that ambiguous jury instructions on accomplice liability, in combination with other factors, unconstitutionally relieved the State of its burden of proof of an element of the crimes with which he was charged.

I. General Background

Sarausad is a naturalized citizen who immigrated as a child from the Philippines. At the time of the events in question, Sarausad was a 19-year-old student at the University of Washington in Seattle. He had recently graduated from Ingraham High School in Seattle. While still in high

school, Sarausad had tutored other minority students in mathematics. Sarausad had become friends with some of his tutees and had eventually joined their gang, the 23rd Street Diablos ("the Diablos").

On the morning of March 23, 1994, Sarausad picked up three of his friends, Gerald Abad, Levi Arakelyan, and Lucas Gosho. These three were either Diablo members or associates. The four then drove in Sarausad's car to the Pink Pantry convenience store where they met Jerome Reyes, Gaurav Nayar, Brian Ronquillo, Michael Marckx, and Rocky Galbay, also members or associates of the Diablos. Reyes told the group that he had recently been chased from Ballard High School by members of another gang, the Bad Side Posse ("the BSP"). The group decided to go to Ballard to confront the BSP.

The group first went to Shorewood High School, across the street from the Pink Pantry, to see if another member of the Diablos, Michael Vicencio, would join them. Vicencio told them that he would meet them later at the 7-Eleven. The group then went, without Vicencio, to Ballard High School in Sarausad's and Nayar's cars. Sarausad's car was in the lead. They drove past an area of the school where BSP members were thought to be, shouting insults, showing gang signs, and waving bandanas. They came back a few minutes later and stopped their cars near a group of six to ten students. They got out of the cars, and a yelling and pushing match ensued. After a short time, someone yelled that the police were there. The group got back into the cars and left. As they drove away, some of the Ballard students yelled that they were "weak."

The group then went to Nayar's house, but Sarausad, Abad, and Reyes went to the 7-Eleven to get Vicencio. Vicencio followed Sarausad back to Nayar's house in his car. Before Vicencio entered the house, Ronquillo met him outside and asked for Vicencio's gun. Vicencio gave the gun to Ronquillo. There is no evidence that Sarausad was present when Ronquillo asked for and was given the gun. At Nayar's house the group listened to music, danced, and initiated a new member into the gang. They left when Nayar told them that his mother would be coming home soon.

The group got into two cars, this time Sarausad's and Vicencio's. Though he was carrying Vicencio's gun, Ronquillo rode in Sarausad's rather than Vincencio's car. Sarausad stopped his car a few blocks away from Ballard High School, and Vicencio pulled up beside him. There was a brief conversation between the people in the two cars. They then continued on to the school with Sarausad leading, as he had done on the first trip.

Melissa Fernandes, Ryan Lam, and Tam Nguyen were standing outside the school. As he approached, Sarausad slowed down to perhaps five miles per hour and drove closer to the curb. As Sarausad slowed the car, Ronquillo fired between four and ten shots from the front passenger seat. Lam and Nguyen dropped to the ground and were unharmed. Melissa Fernandes was hit. She died the next day at the hospital. Brent Mason, a student who had just stepped out of shop class, was struck in the leg by a bullet fragment. Sarausad and Vicencio both drove away rapidly, with Sarausad's car still in the lead.

After leaving the school, the two cars stopped and Ronquillo transferred Vicencio's gun to Vicencio's car. Then Sarausad and Vicencio both drove to the Northgate mall. Sarausad left the others at the mall and went home. The gun used in the murder was later destroyed by other members of the group.

The State prosecuted Ronquillo (the shooter), Sarausad (the driver), and Reyes (a passenger in the back seat of Sarausad's car). The State offered plea agreements and lenient treatment to others in the group on the condition that they testify against Ronquillo, Sarausad, and Reyes.

All three defendants were charged with one count of first-degree murder, two counts of attempted first-degree murder, and one count of second-degree assault. The theory of the State's case against Sarausad and Reyes was that they were accomplices, and were therefore guilty of murder despite not having fired any shots. The only seriously contested issue at Sarausad's trial was whether he had the requisite knowledge to be an accomplice to murder. At the time of his trial, it was unclear under Washington law whether an accomplice had to have knowledge that the principal merely intended to commit a crime, or whether the accomplice had to know that the principal intended to commit *the particular* crime in questions.

Ronquillo was convicted on all counts as charged. Sarausad was convicted of the lesser-included crimes of one count of second-degree murder, and two counts of attempted-murder, and of one count of second-degree assault. The jury hung, and a mistrial was declared, as to Reyes.

Sarausad's counsel moved for a new trial. In a declaration in support of the motion, Sarausad's counsel stated that during a post-verdict interview, jurors stated that the jury had been confused about what was required to prove accomplice liability. The court denied the motion. Sarausad's counsel then moved for reconsideration, attaching declarations in which two jurors stated that the jury had been confused about accomplice liability. The court denied the motion for reconsideration. Sarausad was then sentenced to more than 27 years in state prison.

Sarausad's convictions were affirmed on direct appeal by the Washington Court of Appeals. *State v. Ronquillo*, No. 38540-5-I, 1998 WL 87641, at *9 (Wash. Ct. App. Mar. 2, 1998). The Washington Supreme Court denied review. *State v. Ronquillo*, 966 P.2d 1277 (Wash. 1998). Sarausad then sought collateral review through a personal restraint petition ("PRP") in the Washington Court of Appeals. The Court of Appeals denied relief, *see State v. Sarausad*, 39 P.3d 308 (Wash. Ct. App. 2001), and the Washington Supreme Court denied review.

Sarausad then sought a writ of habeas corpus in federal district court under 28 U.S.C. § 2254, challenging his second-degree murder and two attempted second-degree murder convictions. He did not challenge his second-degree assault conviction. In a thorough Report and Recommendation, the magistrate judge recommended that Sarausad's habeas petition be granted on two grounds – first, that there was insufficient evidence to convict Sarausad, and, second, that the jury instructions, in combination with other factors, unconstitutionally relieved the State of its burden of proof. The district

court agreed with the magistrate judge's recommendation on both grounds and granted the writ subject to the State's election to retry Sarausad.

The State appeals Sarausad cross-appeals, contending, inter alia, that the district court erred in holding that double jeopardy does not bar retrial after reversal of a conviction for insufficient evidence. Sarausad's release has been stayed pending appeal.

We reverse the decision of the district court on the sufficiency-of-the-evidence ground. However, we affirm on the ground that the State was improperly relieved of its burden of proof. We need not reach Sarausad's claims on cross-appeal.

II. Standard of Review

We review de novo the district court's decision to grant a habeas petition under 28 U.S.C. § 2254. *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004) (as amended). Because Sarausad filed his petition after April 16, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies. *Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004). AEDPA provides that a federal habeas court shall not grant a writ of habeas corpus from a state court unless the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in

> light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d)(1) establishes as two-part test. First, there must be clearly established Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 381, 412 (2000). Second, the state court decision must either be "contrary to" or an "unreasonable application" of that precedent. *Id.* at 384-86. The state court is not required to cite the controlling Supreme Court precedent so long as its decision is not "contrary to" or an "unreasonable application" of that precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam).

The terms "contrary to" and "unreasonable application" have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). A state court's decision is "contrary to" clearly established Supreme Court precedent if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. A state court's decision is an unreasonable application of clearly established Supreme Court precedent "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*; *see Gibson v. Ortiz*, 387 F.3d 812, 814 (9th Cir. 2004). The "unreasonable application" clause requires more than that the state court decision be incorrect. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Rather, a federal habeas court making an

"'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. This analysis imposes a "'highly deferential standard for evaluation state-court rulings'" and "'demands that state court decisions be given the benefit of the doubt.'" *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003) (citations omitted).

In determining whether a state court decision is "contrary to" or an "unreasonable application" of federal law under § 2254(d)(1), we look to the last reasoned decision of the state court. *Barker v. Fleming*, 423 F.3d 1085, 1091-92 (9th Cir. 2005). We therefore review the Washington Supreme Court's written order denying Sarausad's petition for review of the Court of Appeals' decision. To the extent that this denial relies on the Washington Court of Appeals' denial of the PRP, we review that decision as well.

III. Discussion

A. Sufficiency of the Evidence

[1] Under clearly established Supreme Court case law, due process requires that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (explaining *In re Winship*, 397 U.S. 358, 364 (1970)). To determine whether this due process right has been violated, the appropriate inquiry before the passage of AEDPA was a straightforward question of

"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). We have recently joined our sister circuits in using § 2254(d)(1) to evaluate a state court's sufficiency-of-the-evidence determination under *Jackson*. *See Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005) (as amended); *see also Ponnapula v. Spitzer*, 297 F.3d 172, 179 (2d Cir. 2002); *Sanford v. Yukins*, 288 F.3d 855, 863 (6th Cir. 2002); *Piaskowski v. Bett*, 256 F.3d 687, 691 (7th Cir. 2001); *Hurtado v. Tucker*, 245 F.3d 7, 16 (1st Cir. 2001). Under 28 U.S.C. § 2254(d)(1), we inquire whether a state court determination that the evidence was sufficient to support a conviction was an "objectively unreasonable" application of *Jackson*. *See Juan H.*, 408 F.3d at 1275 n.13; *see also Smith v. Mitchell*, 437 F.3d 884, 889 (9th Cir. 2006) ("Our task under AEDPA . . . is to determine whether the decision of the[state court], holding that the evidence was sufficient to convict[the defendant], was an unreasonable application of *Jackson*.").

Section 2254(d)(1) plainly applies to *Jackson* cases. A state court must decide under *Jackson* whether the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the defendant guilty beyond a reasonable doubt. If the state court affirms a conviction under *Jackson*, a federal court is asked under § 2254(d)(1) to decide whether the state court adjudication "resulted in a decision that . . . involved an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States." That is, we are asked to decide

whether the state court's application of *Jackson* was "objectively unreasonable." *Juan H.*, 408 F.3d at 1275 n.13.

[2] By contrast, § 2254(d)(2) is not readily applicable to *Jackson* cases. Under § 2254(d)(2), the federal court must decide whether the state court adjudication "resulted in a decision that was based on an unreasonable *determination of the facts* in light of the evidence presented in the State court proceeding." (Emphasis added.) Section 2254(d)(2) does not describe the task of a court in performing a *Jackson* analysis. A court under *Jackson* makes no "determination of the facts" in the ordinary sense of resolving factual disputes. Rather, the court views the evidence in the light most favorable to the prosecution without resolving any disputed factual questions. Our task under AEDPA in reviewing a state court's holding applying *Jackson* is not to decide whether that court unreasonably determined disputed facts. It is, rather, to decide whether the state court unreasonably applied the *Jackson* test of "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

[3] We therefore evaluate a state court's resolution of a *Jackson* sufficiency-of-the-evidence claim in all cases under § 2254(d)(1) rather than § 2254(d)(2), as we have already held in *Juan H.* The First Circuit has adopted guidelines for applying the "objective unreasonableness" test under § 2254(d)(1) to a state court decision applying *Jackson*. We believe that these guidelines are useful, though not

all of them will necessarily apply in any particular case. The guidelines are as follows:

> (1) The focus of the inquiry is on the state court decision;
>
> (2) Even with the deference due by statute to the state court's determinations, the federal habeas court must look to the "totality of the evidence" in evaluating the state court's decision;
>
> (3) The failure of the state court to consider at all a key argument of the defendant may indicate that its conclusion is objectively unreasonable; however, the paucity of reasoning employed by the state court does not itself establish that its result is objectively unreasonable;
>
> (4) The failure of a state court to give appropriate weight to all of the evidence may mean that its conclusion is objectively unreasonable; and
>
> (5) The absence of cases of conviction precisely parallel on their facts does not, by itself, establish objective unreasonableness.

Hurtado, 245 F.3d at 18.

In performing a *Jackson* analysis, "'[c]ircumstantial evidence and inferences drawn from [the record] may be sufficient to sustain a conviction.'" *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (quoting *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir.), *amended by* 798 F.2d 1250 (9th Cir. 1986)). However, "'mere suspicion or speculation cannot be the basis for creation of logical

inferences.'" *Id.* (quoting *Lewis*, 787 F.2d at 1323). Where behavior is consistent with both guilt and innocence, the burden is on the State to produce evidence that would allow a rational trier of fact to conclude beyond a reasonable doubt that the behavior was consistent with guilt. *United States v. Bautista-Avila*, 6 F.3d 1360, 1363 (9th Cir. 1993). However, "the prosecution need not affirmatively 'rule out every hypothesis except that of guilt[.]'" *Wright v. West*, 505 U.S. 277, 296 (1992) (citation omitted). A jury's credibility determinations are "entitled to near-total deference under *Jackson*." *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004).

[4] The *Jackson* standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004) (en banc) (internal quotation marks omitted). Under Washington law, Sarausad is guilty based on an accomplice liability theory if he "acted with knowledge that his . . . conduct would promote or facilitate the[murder]." *State v. Cronin*, 14 P.3d 752, 759 (Wash. 2000); *see State v. Roberts*, 14 P.3d 713, 736 (Wash. 2001) (as amended). Under *Roberts* and *Cronin*, it is not enough under Washington law that the accomplice had knowledge that the principal would engage in some kind of crime. He must have had knowledge that the principal would engage in the crime actually committed. *Roberts*, 14 P.3d at 736; *Cronin*, 14 P.3d at 759. He need not be a lawyer. That is, he does not need to have "specific knowledge of the elements of the participant's crime." *In re Domingo*, 119 P.3d 816, 820 (Wash. 2005) (en banc). But he does need to have "'general knowledge' of the crime charged" against the principal. *Id.*

In ruling on Sarausad's PRP, the Washington Court of Appeals held that "when viewed in the light most favorable to the State" the circumstantial evidence presented at trial was "sufficient to allow a rational jury reasonably to infer that Sarausad knowingly facilitated the drive-by shooting." *Sarausad v. State*, 39 P.3d 308, 319 (Wash. Ct. App. 2001). In so holding, the court did not cite to controlling United States Supreme Court precedent, but such citation is not required. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). The Washington Supreme Court denied review in an unpublished order. We review the denial of Sarausad's PRP to determine whether it was based on an "objectively unreasonable" application of *Jackson*.

In support of its holding that there was sufficient evidence to sustain Sarausad's conviction, the Court of Appeals wrote:

> [Witnesses] Gosho and Marckx testified that "capping" was discussed on the return trip to the school. At some point before the shooting, Ronquillo tied a bandana over the lower part of his face and pulled the gun out of his pants. While parked side by side with the other carload of Diablos, Sarausad said, "Are you ready?" Sarausad then drove the car in such a manner as to facilitate a drive-by shooting, not in such a manner as to stop, park the vehicle and engage in fisticuffs. An expert in gangs testified about the kind of gang mentality that requires the gang to avenge its honor when one of its members is disrespected by a rival gang, and that causes the gang members to

> see violence is an acceptable means of regaining lost respect.

Sarausad, 39 P.3d at 319 (footnote omitted). The Washington Supreme Court affirmed the Court of Appeals' holding on evidentiary sufficiency without discussion of the evidence.

[5] The Court of Appeals' statement that the evidence showed that "Gosho and Marckx testified that 'capping' was discussed on the return trip to the school" is incorrect. Contrary to the Court of Appeals' statement, Gosho never testified that "capping" (meaning "shooting") was discussed on the return trip to the school. Gosho did testify about a conversation concerning the possibility of a shooting, but that conversation took place before the return trip to the school. The distinction is important because Sarausad was driving the car in which Gosho was riding and almost certainly would have heard the conversation had it taken place in the car. But if the conversation took place before the return trip to the school, as Gosho testified, there is no direct evidence that Sarausad heard it. Gosho never testified that Sarausad participated in or heard the conversation.

Gosho testified as follows:

> Q (Prosecutor) You were asked about the plan that day. What was your understanding of the range of options with respect to shooting?
>
> A (Gosho) I knew that it was one of the options, but I didn't seriously think it was going to be because there were, you know, there was other options.

Q With respect to shooting being an option, do you recall what was said about that as an option?

A I can't recall who said what. But, you know, somebody must've brought it up, that we could shoot as an option.

Q I'm sorry, what?

A I can't recall one person saying that. But, you know, it was brought up as an option, so yeah.

Q What was said specifically with respect to shooting being an option?

A Well just that, you know, it was a possibility that we could, you know.

Q Was there anything mentioned with respect to a gun and shooting?

A I don't recall exactly. But, you know, there must have been a gun if we were going to shoot.

The prosecutor sought to refresh Gosho's memory with a police report:

Q (Prosecutor). . . . Do you recall at that point in the interview when Detective Maning was asking you about the discussion regarding the possibilities with respect to shooting?

A (Gosho) Yes, I do.

Q Do you recall Detective Maning saying to you, "Okay. So somebody, well, we've got a gun, we can shoot them"? What was your response?

A It was, "Right."

Q You said, "Right"?

A Yeah.

Q And Detective Maning responded by saying, "I mean, I don't know. Is that what was said?" What was your response then?

A I said, "Well, I don't recall specifically."

Q Detective Maning then asked you, "But somebody said, 'We've got a gun.'" And what was your response?

A I said, "Yeah."

On cross-examination, Gosho explained further:

Q (Reyes's attorney). . . . The answer to Detective Maning's question at that time, did you understand that to mean that somebody had a gun right then in [Gaurav Nayar's] house or in the car, or that there was a gun available to that group at some point?

A (Gosho) Well, they had said that a shooting was a possibility. So obviously, you know, yeah, there must've been access to a gun if there was going to be-I mean, if it was a possibility.

Q You answered some questions of some of the other attorneys that this was a general conversation and you didn't take it seriously. Is that correct?

A Right.

Q You didn't think that a shooting was actually being planned-

A Right.

Also contrary to the Court of Appeals' statement, Marckx did not testify that "capping" was discussed on the return trip to the school. Marckx had ridden in the back seat of Sarausad's car on the return trip. He testified that an unidentified person in the back seat asked "Are we going to cap?" immediately before Ronquillo began to shoot. There was no "discussion" because no one had time to answer the question before the shooting started. The point is important because if there had been a "discussion" in the car before the shooting started, the discussion would have put Sarausad on notice of the possibility of such a shooting when he slowed his car in front of the school.

Marckx testified as follows:

Q (Prosecutor) Let me take you back briefly to the shooting itself when you guys were parked on 14th Avenue Northwest where you were headed down to the school. Was there any discussion about capping or shooting?

A (Marckx) I heard someone say, "Are we going to cap?"

Q What does the term "cap" mean?

A Shoot.

Q That was in your car?

A Yes.

Marckx testified that the question had been asked immediately before the actual shooting:

Q (Ronquillo's attorney) Now, you say that prior to the shooting you heard somebody say something about capping.

A (Marckx) Yeah.

Q And that meant what to you?

A "Are we going to shoot?"

Q What did you say?

A I didn't say anything, because right when it was said Brian [Ronquillo] was shooting.

Q You mean, he was shooting as it was being said?

A Immediately after it was said.

The testimony continued:

Q (Sarausad's attorney). . . . This was a comment something to the effect of, "Are we going to cap." Right?

A (Marckx) Um-hmm.

Q This happened just a moment or two before the actual shooting, is that correct?

A Yeah.

Q In fact, there was a single query, single question.

A Yeah.

Q There was no response to that other than the actual shooting. Is that correct?

A Yeah.

Q Before anyone could say anything in response to that, you noticed, you heard and realized the shooting was taking place.

A Yeah.

[6] Thus, it was "objectively unreasonable" for the Washington Court of Appeals to state that "Gosho and Marckx testified that 'capping' was discussed on the return trip to the school." For purposes of our AEDPA review, we disregard this purported evidence in evaluating the Court of Appeals' conclusion that the *Jackson* standard had been satisfied. However, given other evidence in the record, not limited to that described by the Court of Appeals, we hold that the court's application of *Jackson* was not objectively unreasonable.

Some of that other evidence was accurately described by the Court of Appeals. The court wrote that at some unspecified point before the shooting, Ronquillo tied a bandana over the lower part of his face; that when the two cars were parked side-by-side before going back for the second trip to Ballard High School, Sarausad asked, "Are you ready?"; and that Sarausad slowed his car in front of the school in a manner that facilitated a drive-by shooting.

Much of the other evidence was not described by the Court of Appeals. This evidence largely involves questions of when a gun was seen, when a gun was displayed or used, and when the use of a gun was discussed. Though circumstantial, this evidence goes to the likelihood that Sarausad knew that Ronquillo had a gun on the return trip to Ballard High School and knew that Ronquillo intended to use it.

The record contains evidence that it was Sarausad who went to get Vicencio at the 7-Eleven after the first trip to Ballard High School. Vicencio testified at trial that "others in the gang" knew that he had a gun. Sarausad was a member of the gang. Gosho testified that various options were discussed at Nayar's house for a return trip to the school. He said, "[W]e might just look at them or fight them or yell at them or fight them or possibly shoot them." The prosecutor then asked, "You said possibly shoot them. Was that an option that was discussed with everybody in the house?" Gosho answered, "Yes."

Two witnesses testified that they thought they saw a gun in the hands of a Diablo during the first trip to the school. One of them testified that a Diablo had pulled a gun part way out of his pants. The other witness said that a Diablo had pointed something that "looked like a gun" at him. "It was either pointed at my neck or my face. . . . I just saw a gun was pointed at me."

Another witness testified that she had seen a red car circling several times around Ballard High School with five or six male "kids" in it. Sarausad's car was red. At one point, the car stopped and one of the passengers got out to pick up a hat. The witness described the passenger as having "a darker complexion." This same witness testified that she later saw what she thought was a gun being held outside that same car:

> A: [As the car] came around the corner I saw what I thought somebody pulling something back in. And at that point, I turned to my girlfriend and I said, 'I think I saw a gun.' And the car, you know, sped off.

. . .

Q: Could you tell where in the car the individual might have had a weapon was?

A: Behind the driver. That's where I saw the arm come back in.

Q: What made you think it was a weapon?

A: Well, I think it's not-it wasn't like anything I've seen as a gun, except the barrel. I could see like a glint off of the barrel on it.

The witness testified further, "And then shortly after that, I don't know how long, heard the shots. . . . I would say at least six. . . . I mean it was constant, bang bang bang bang bang."

Sarausad admitted in his trial testimony that he had told a detective, in an interview after the shooting, that he suspected that members of the other gang at Ballard High School had guns. However, Sarausad testified that he had not meant to tell the detective that he suspected this before the return to the school, but rather that he had begun to suspect this only afterwards. Sarausad further testified that, when the two cars stopped on their way back to the school, he had instructed those in the other car, "Follow me." The prosecutor asked, "Beyond follow you, what was the plan?" Sarausad answered, "Well that we would drive by, drive towards them." Sarausad testified that he was "not sure" whether Ronquillo had already pulled a bandana over his face when the car was stopped before getting back to the school.

[7] For purposes of reviewing the Court of Appeals' holding that there was sufficient evidence

under *Jackson* to support Sarausad's conviction, we assume that the jury was properly instructed on Washington's accomplice liability law. That is, we assume, for present purposes, that the jury understood that Sarausad could be convicted of murder on a theory of accomplice liability only if he knew that Ronquillo intended to commit murder. The Court of Appeals described some of the evidence accurately, described some of it inaccurately, and failed to mention some of it. We have considered the evidence in the light most favorable to the prosecution, as we are required to do under *Jackson*. We have not considered (or described here) the evidence that contradicted or minimized the importance of the evidence favoring the prosecution. The evidence supporting the conclusion that Sarausad knew that Ronquillo planned to shoot students on the return trip to Ballard High School was somewhat thin, and it was circumstantial. However, based on our review of all the evidence in the record, we conclude that the Court of Appeals was not "objectively unreasonable" in concluding that the *Jackson* standard was satisfied.

B. Impermissible Shifting of Burden of Proof

[8] Clearly established Supreme Court case law provides that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. As a consequence, a jury instruction is constitutionally defective if it "ha[s] the effect of relieving the State of the burden of proof enunciated in *Winship*." *Sandstrom v. Montana*, 442

U.S. 510, 521 (1979). Clearly established Supreme Court case law specifies the standard for reviewing an ambiguous instruction: "[W]e inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citation omitted).

The test stated in *Estelle* for ambiguous instructions was first articulated in deciding an Eighth Amendment challenge to a jury instruction in *Boyde v. California*, 494 U.S. 370, 380 (1990), but *Estelle* employed the test to decide a Due Process Clause challenge to a jury instruction outside the Eighth Amendment context. *Estelle*, 502 U.S. at 66-67. *Estelle* made a point of stating that its articulation and application of the test was established law. The Court wrote, "So that we may once again speak with one voice on this issue, we now disapprove the standard of *Cage* [*v. Louisiana*, 498 U.S. 39 (1990)] and *Yates* [*v. Evatt*, 500 U.S. 391 (1991)], and reaffirm the standard set out in *Boyde*." *Estelle*, 502 U.S. at 73 n.4; *see also Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (per curiam) (applying the established rule that "a jury instruction violates due process if . . . there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution") (internal quotation marks omitted); *Patterson v. Gomez*, 223 F.3d 959, 962 (9th Cir. 2000) (same). The Court in *Estelle* emphasized that, in determining whether there was a "reasonable likelihood" of misunderstanding, "the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72

(quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The Court noted in *Boyde* that "arguments of counsel generally carry less weight with a jury than do instructions from the court," but they may sometimes "have a decisive effect on the jury." *Boyde*, 494 U.S. at 384.

1. Background

The only seriously contested issue during Sarausad's trial was whether he knew that Ronquillo intended to commit murder on the return trip to Ballard High School. At the time of the trial, it was widely thought that Washington law did not require the accomplice to know what particular crime the principal intended to commit. During closing argument, the prosecutor carefully and repeatedly articulated this view of Washington law. She explained to the jury that accomplice liability was based on an "in for a dime, in for a dollar" theory. That is, if the accomplice knew that the principal intended to commit some crime-any crime-the accomplice was liable for whatever crime the principal committed, even if the accomplice had no idea that the principal intended to commit that particular crime. Thus, under this view of the law, even if Sarausad believed that Ronquillo intended only to commit assault, Sarausad was nevertheless liable as an accomplice for the murder actually committed by Ronquillo.

In her closing argument, the prosecutor said:

> Under the laws of the State of Washington, people who help commit crimes, people who set the wheels in motion, people who assist in the commission of crimes are called

accomplices or aiders and abettors, as we more commonly know them to be. And in the eyes of the law, you are no less guilty because you drive the getaway car or because you solicit a crime to occur. You're no less guilty for helping than you are for pulling the trigger.

The defendants, Mr. Sarausad and Mr. Reyes, are classic accomplices. And let's talk a little bit about the law of accomplice liability as it exists in our state. You're going to have two instructions that talk about accomplice liability. . . .

. . . .

Let me give you a good example of accomplice liability. A friend comes up to you and says, "Hold this person's arms while I hit him." You say, "Okay, I don't like that person anyway." You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, "Well, I only intended this much damage to happen." Your presence, your readiness to assist caused the crime to occur and you are an accomplice. The law in the State of Washington says, if you're in for a dime, you're in for a dollar. If you're there or even if you're not there and you're helping in some fashion to bring about this crime, you are just as guilty.

. . . .

The defendant, Mr. Sarausad, classic accomplice in this case. He's the driver, he's the wheelman. . . .

> Both these cases, ladies and gentlemen, the defendants, Mr. Sarausad and Mr. Reyes, they were both present and they were certainly ready to assist. . . .
>
> They were all there that day, especially these three, ready to back each other up in whatever happened. In for a dime, they were in for a dollar and they were sticking together.

In response, Sarausad's lawyer argued that Washington accomplice liability was not based on "in for a dime, in for a dollar." In rebuttal, the prosecutor again stated that this was, indeed, Washington law. She said:

> And I've told you the old adage, you're in for a dime, you're in for a dollar. If their logic was correct, they're not ever an accomplice to anything. The getaway driver for a bank robbery would say, "I just told him to rob them, I didn't tell him to shoot him, I didn't do anything." The example I gave you earlier, "I just told my friend to hold the arms down of this person while he hit him, I didn't tell him to kill him, I'm not guilty of anything." If you're in for a dime, you're in for a dollar.
>
> . . . . In for a dime, you're in for a dollar.
>
> The defendant, Mr. Ronquillo, did not act alone. He acted with the assistance of the driver, Mr. Sarausad[.]

The accomplice liability instructions in Sarausad's case were based on Wash. Rev. Code § 9A.08.020. Jury Instruction 45 stated the general concept of accomplice liability under Washington

law: "You are instructed that a person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *the crime*." Instruction 46 then provided a definition of accomplice liability:

> A person is an accomplice in the commission of *a crime* if, with knowledge that it will promote or facilitate the commission of *the crime*, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit *the crime* or
>
> (2) aids or agrees to aid another person in planning or committing *the crime*.

Instruction 47 defined intent: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes *a crime*." Instruction 48 defined knowledge: "A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being *a crime*. . . . Acting knowingly or with knowledge also is established if a person acts intentionally."[1] (Emphasis added to all instructions.)

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[1] Quoted in their entirety, the accomplice liability instructions were:

No. 45: You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable

On the third day of its deliberations, the jury sent out the following note:

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for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

No. 46: A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

No. 47: A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

No. 48: A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

> Request clarification on instruction No. 11 & No. 12 [first-degree murder instruction as to Sarausad] element (3) [that the intent to cause the death was premeditated]; does the "intent" apply to (the defendant only) or to (the defendant or his accomplice)?

The judge responded: "Refer to instructions 46 and 47 and consider your instructions as a whole."

On the fifth day of deliberations, the jury asked to "rehear" Sarausad's testimony. The judge responded that the "[t]estimony will not be repeated." On the sixth day of deliberations, the jury sent out the following note:

> Reference: Instruction No. 17 [second-degree murder instruction as to Sarausad] in "the crime of murder in the second-degree (intentional)."
>
> Question: Does intentional apply to only the defendant or only his accomplice?

The judge responded that the jury should "[r]efer to instructions 45 & 46 and consider the instructions as a whole."

Finally, on the seventh day of deliberations, the jury sent out the following note:

> We are having difficulty agreeing on the legal definition and concept of "accomplice."
>
> Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?

After conferring with counsel, the judge told the jury to "[r]eread instructions # 45, 46, 47 and 48, and consider your instructions as a whole." The next day, the jury returned a verdict finding Sarausad guilty of second-degree murder, two attempted second-degree murders, and second-degree assault.

Sarausad's counsel moved for a new trial. In a declaration in support of the motion, counsel stated that during a post-verdict interview, at which both the trial judge and counsel were present, the jury foreman and other members of the jury stated that they did not think Sarausad intended to kill anyone, that they had been confused by the concept of accomplice liability, and that they had been swayed by the prosecutor's "in for a dime, in for a dollar" theory. The court denied the motion for a new trial.

Sarausad's counsel then moved for reconsideration. This time, he supplemented his motion with sworn declarations from two jurors. Both jurors stated that they found the accomplice liability instructions to be very confusing and that they did not think Sarausad intended to facilitate the shootings. The court denied the motion for reconsideration. Sarausad was then sentenced to more than 27 years in state prison.

On direct appeal to the Washington Court of Appeals, Sarausad argued that "in for a dime, in for a dollar" was an inaccurate statement of Washington law of accomplice liability. Specifically, in the words of the Court of Appeals, Sarausad argued "that to convict a person as an accomplice to a substantive crime that requires proof of intent, the State must prove that the accomplice intended to help the principal commit that particular crime." *State v.*

Ronquillo, No. 35840-5-I, 1998 WL 87641, at *8 (Wash. Ct. App. Mar. 2, 1998).

The Court of Appeals disagreed with Sarausad's argument. The court first quoted part of the Washington accomplice liability statute. In relevant part, that statute provides:

> (1) A person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> . . .
>
> (c) He is an accomplice of such other person in the commission of *the crime*.
>
> (3) A person is an accomplice of another person in the commission of *a crime* if:
>
> (a) With knowledge that it will promote or facilitate the commission of *the crime*, he
>
> (i) solicits, commands, encourages, or requests such other person to commit *it*; or
>
> (ii) aids or agrees to aid such other person in planning or committing *it* [.]

Wash. Rev. Code § 9A.08.020 (1994) (emphasis added). The court then quoted Instruction 46, which closely tracked the statutory language. The only difference between the statute and the instruction was that the word "it," which appears twice in the

statute, was each time replaced by the words "the crime" in the instruction.

The Court of Appeals concluded that the statute, as well as the jury instructions, were based on the "in for a dime, in for a dollar" theory of accomplice liability. The court agreed with the prosecution's statement of the law to the jury during her closing argument. It held that the statute and the instructions did *not* require that an accomplice have knowledge of the particular crime the principal intended to commit.

The Court of Appeals wrote:

> Sarausad misstates the law in Washington when he asserts that to be convicted as an accomplice, the State must prove that the accomplice had the mental state required for commission of the charged offense. His argument that an accomplice is only liable for that substantive offense which he willfully sought to bring about has specifically been rejected in Washington.
>
> In order to convict an accomplice of intentional murder, the State need not show that the accomplice had the intent that the victim would be killed. RCW 9A.08.020(3)(a) has no such requirement.
>
> Accomplice liability in Washington is premised on the following principles: (1) To convict of accomplice liability, the State need not prove that principal and accomplice shared the same mental state, (2) accomplice liability predicates criminal liability on general knowledge of a crime, rather than specific

> knowledge of the elements of the principal's crime, and (3) an accomplice, having agreed to participate in a criminal activity, runs the risk that the primary actor will exceed the scope of the preplanned illegality.

Ronquillo, 1998 WL 87641, at *9 (citations omitted). The Washington Supreme Court denied review without comment. *State v. Ronquillo*, 966 P.2d 1277 (Wash. 1998).

In two other cases, decided shortly thereafter, the Washington Supreme Court repudiated the "in for a dime, in for a dollar" theory that had been the basis for the Court of Appeals' affirmation of Sarausad's conviction. In *State v. Roberts*, 14 P.3d 713 (Wash. 2001) (as amended), Jury Instruction 7 had defined accomplice liability as follows:

> You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *a crime*.
>
> A person is an accomplice in the commission of a crime . . . if, with knowledge that it will promote or facilitate *its* commission, he either:
>
> (a) solicits, commands, encourages or requests another person to commit the crime; or
>
> (b) aids another person in planning or committing the crime [.]

Id. at 735 (italics in original; underlining added). In rejecting the "in for a dime, in for a dollar" theory of

accomplice liability and disapproving the jury instruction, the Washington Supreme Court wrote, "The Legislature . . . intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge,'. . . . In contrast, jury instruction 7 here essentially allowed the jury to impose strict liability on Roberts. The instruction, therefore, improperly departed from the language of the statute." *Id.* at 735-36.

In *State v. Cronin*, 14 P.3d 752 (Wash. 2000), the Washington Supreme Court "adhere[d]" to its decision in *Roberts*:

> [T]he fact that a purported accomplice knows that the principal intends to commit "'a crime'" does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal. *See Roberts*, 14 P.3d at 736. In our judgment, in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged.

Id. at 758 (emphasis in original).

Sarausad brought his PRP in the Washington Court of Appeals after the Washington Supreme Court decided *Roberts* and *Cronin*. Now sitting with three different judges from those who heard Sarausad's direct appeal, the Court of Appeals wrote that the previous Court of Appeals panel had misinterpreted the Washington statute when it denied relief in Sarausad's direct appeal based on the "in for a dime, in for a dollar" theory. *State v.*

Sarausad, 39 P.3d 308, 313-14 (Wash. Ct. App. 2001). Recognizing that *Roberts* and *Cronin* had repudiated that reading of the statute, the Court of Appeals now held that Sarausad's jury instructions "mirrored" the state statute on accomplice liability "and thus did not suffer from the fatal flaw in *State v. Roberts*." *Id.* at 313. The Court of Appeals did not mention the fact that the prior panel on direct appeal in Sarausad's case had held essentially the opposite. That is, it did not mention that the prior panel of the Court of Appeals had held that the Washington statute and Sarausad's jury instructions meant the opposite of what the Washington Supreme Court later held the statute to mean in *Roberts* and *Cronin*, and that the prior panel had held that the statute and jury instructions were based on the now-repudiated "in for a dime, in for a dollar" theory of accomplice liability.

Sarausad specifically argued to the second Court of Appeals panel that the prosecutor's "in for a dime, in for a dollar" argument misstated the law of accomplice liability and misled the jury, thereby relieving the State of its burden to prove every element of the crime beyond a reasonable doubt. He argued that "the prosecutor erroneously assumed, and argued, that the jury could find Sarausad guilty as an accomplice to murder if he had the purpose to facilitate an offense of any kind whatsoever, even a shoving match or fist fight." *Id.* at 316-17. The Court of Appeals responded, "But this is not an accurate description of the prosecutor's actual argument." *Id.* at 317. It continued, "[T]he prosecutor did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a fist fight,

he nevertheless was guilty of murder." *Id.* at 318 (emphasis in original). "Not once did the prosecutor suggest to the jury that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight. . . ." *Id.* at 319.

These statements by the Court of Appeals are flatly contradicted by the record. As is obvious from the trial transcript (quoted at length above), the prosecutor argued clearly, emphatically, and repeatedly that Sarausad could be convicted of accomplice liability for murder even if he believed that Ronquillo intended merely to commit assault. We quote again only a small portion of the prosecutor's argument:

> Let me give you a good example of accomplice liability. A friend comes up to you and says, "Hold this person's arms while I hit him." You say, "Okay, I don't like that person anyway." You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, "Well, I only intended this much damage to happen." . . . The law in the State of Washington says, if you're in for a dime, you're in for a dollar.

Based in part on its incorrect description of the prosecutor's argument, the Court of Appeals denied Sarausad's PRP.

In an unpublished written order signed by the Court Commissioner, the Washington Supreme Court denied review. The Court Commissioner, like

the Court of Appeals, did not acknowledge that the Court of Appeals had held on direct appeal that the jury in Sarausad's case had been permitted to convict based on the "in for a dime, in for a dollar" reading of the Washington statute. Instead, the Commissioner wrote, "[H]ere the trial court correctly instructed the jury that it could convict Mr. Sarausad of murder or attempted murder as an accomplice only if it found he knowingly aided in the commission 'the' [sic] crime charged." In denying the PRP, the Commissioner, like the Court of Appeals, flatly misstated the record in describing the prosecutor's argument to the jury. The Commissioner wrote, "The prosecutor never suggested Mr. Sarausad could be found guilty if he had no knowledge that a shooting was to occur."

2. Discussion

Under *Estelle v. McGuire*, 502 U.S. 62 (1991), we first ask whether the jury instructions were ambiguous. If the instructions were ambiguous, we then ask "in the context of the instructions as a whole and the trial record" whether there was a "reasonable likelihood that the jury has applied the instruction in a way that violates the Constitution." *Id.* at 72 (citations and internal quotation marks omitted). We consider these questions in turn.

a. Ambiguous Jury Instructions

The sole contested legal issue in Sarausad's trial was whether he could be convicted as an accomplice to murder and attempted murder if he did not know that Ronquillo intended to commit murder. For three reasons, we conclude that the

instructions given in his case were ambiguous with respect to this issue.

[9] First, nowhere in the jury instructions is there an explicit statement that an accomplice must have knowledge of the actual crime the principal intends to commit. The more important instructions are numbers 45 and 46. They state, in relevant part:

> [Number 45:] You are instructed that a person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *the crime*.
>
> [Number 46, in part:] A person is an accomplice in the commission of *a crime* if, with knowledge that it will promote or facilitate the commission of *the crime*, he or she either:
>
> > (1) solicits, commands, encourages, or requests another person to commit *the crime* or
> >
> > (2) aids or agrees to aid another person in planning or committing *the crime*.

(Emphasis added.) The critical issue is the definition of the term "a crime," as that term is used at the beginning of Instruction 46. That term could mean "the crime" actually committed by the principal (whatever it turned out to be), or it could mean "the crime" the accomplice had knowledge the principal intended to commit. It would be easy to add a sentence to the instructions stating which of the two

possible definitions is correct, but the instructions contain no such sentence.

[10] Second, the Washington Supreme Court held that a very similar instruction in *Roberts* allowed the jury to find accomplice liability based on the "in for a dime, in for a dollar" theory. Instruction 7 in *Roberts* is almost identical to Instruction 45 in Sarausad's case. Instruction 7 in *Roberts* provided, in relevant part:

> You are instructed that a person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *a crime*.

Roberts, 14 P.3d at 735 (emphasis added). The only difference between the two instructions is that the words "the crime" at the very end of Instruction 45 in Sarausad's case are replaced by the words "a crime" at the end of the just-quoted portion of Instruction 7 in *Roberts*. The Washington Supreme Court noted that the Washington accomplice statute used the words "the crime" in this place, where Instruction 7 used the words "a crime." The Court held that under Washington law, an accomplice could be held liable for the crime committed by the principal only if he knew that the principal would commit that particular crime. *Id.* It then reversed Roberts' conviction because Instruction 7 "essentially allowed the jury to impose strict liability on Roberts." *Id.* at 736.

Because it uses the words "the crime" where Instruction 7 in *Roberts* used the words "a crime," Instruction 45 in Sarausad's case does not invite an erroneous construction to the same degree as the flawed instruction in *Roberts*. Indeed, in using the words "the crime," Instruction 45 tracks the wording in the Washington accomplice liability statute more closely than Instruction 7. But the simple change from "a crime" to "the crime" in Instruction 45 does not, in our view, make the jury instructions in Sarausad's case unambiguous, for the basic problem identified above remains: There is no sentence in the instructions specifically instructing the jury that a person can be guilty of "a crime" as an accomplice only if that person knows that "a crime" is "the crime" the principal intends to commit.

[11] Third, and perhaps most revealing, the Washington Court of Appeals on direct appeal held that the instructions given in Sarausad's case were consistent with the Washington statute, and that both the instructions and the statute were based on the "in for a dime, in for a dollar" theory of accomplice liability. Sarausad had argued to that court that Washington law required that an accomplice must know "the crime" the principal intended to commit. The Court of Appeals disagreed, holding that it was sufficient under Washington law that the accomplice know that the principal intended to commit "a crime," whether it be the actual crime committed or some other crime. In reaching that conclusion, the court understood both the accomplice liability statute and the jury instructions to be based on this theory of accomplice liability.

The judges on the Court of Appeals are well-trained professionals, skilled in reading legal texts and experts in Washington law. Those judges, on direct appeal, read the statute and the jury instructions as instructing the jury to convict Sarausad as an accomplice *even if he did not know* that Ronquillo intended to commit murder. Given the Court of Appeals' reading of the statute and the jury instructions on Sarausad's direct appeal, we are hard pressed to read the very same statute and instructions as unambiguously instructing the jury to do precisely the opposite-to convict Sarausad *only if he knew* that Ronquillo intended to commit murder.

The dissent argues that the jury instructions could not have been deficient because they closely tracked the language of Washington's accomplice liability statute. The argument contains an obvious flaw. If a statute is ambiguous, any jury instruction that mirrors the statutory language must also be ambiguous. The fact that an instruction quotes from a statute does nothing to make either the statute, or the instruction, more understandable.

Criminal statutes are sometimes upheld and applied only after a court has given a narrowing or clarifying gloss to the statutory language. Many statutes, for example, fail to specify a scienter element. The Supreme Court has often held that such statutes have an implicit mens rea requirement and that trial courts must instruct jurors not to convict defendants without sufficient proof of their state of mind. *Liparota v. United States*, 471 U.S. 419 (1985), is typical. Liparota had been convicted under a federal statute that made it unlawful to

"knowingly . . . acquire[ ]" food stamps in an unauthorized manner. *Id.* at 420 n.1 (quoting 7 U.S.C. § 2024(b)(1)). Although the district court's instructions closely tracked the language of the statute, the Supreme Court reversed Liparota's conviction. As the Court noted, the statute did not "explicitly spell[ ] out the mental state required" to convict a defendant. *Id.* at 424. Under one reading, it was enough that the defendant knowingly acquired food stamps. Under another reading, it was necessary to prove not only that the defendant knowingly acquired food stamps, but also that he knew that the acquisition was unauthorized. The Court insisted on the latter construction: "[T]he Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations." *Id.* at 433. The district court's instructions in *Liparota*, despite their adherence to the statutory language, were defective because they did not adequately convey the required mental state.

Other cases similarly illustrate that jury instructions must frequently clarify, not merely parrot, the statute of conviction. As in *Liparota*, the Supreme Court in *Staples v. United States*, 511 U.S. 600 (1994), considered a statute that was silent on the subject of mens rea. The Court concluded that the jury should have been instructed that it could not return a conviction for unlawful possession of an automatic weapon unless the defendant knew that the "characteristics of his weapon" brought it within the scope of the statute. *Id.* at 604; *see also Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (holding that the jury should have been instructed that it could not convict the defendant unless he knew that his

currency structuring activities were unlawful); *United States v. Speach*, 968 F.2d 795, 796 (9th Cir. 1992) (reversing a defendant's conviction for transporting hazardous waste under a "linguistically ambiguous" statute because the jury instructions failed to require proof that the defendant knew that the recipient of the waste lacked a permit); *cf. Godfrey v. Georgia*, 446 U.S. 420, 437 (1980) (Marshall, J., concurring in the judgment) (explaining that it is inappropriate "[t]o give the jury an instruction in the form of the bare words of the statute" when those words are "hopelessly ambiguous").

[12] The Washington courts have had serious difficulty parsing the Washington accomplice liability statute's knowledge requirement, at times holding that it permits an "in for a dime, in for a dollar" theory, and at times holding the opposite. The jury instructions in Sarausad's case, which essentially tracked the statutory language, were no less confusing than the statute itself. We therefore conclude that the jury instructions were, at the very least, ambiguous on the question of whether Sarausad could be convicted of murder and attempted murder on a theory of accomplice liability without proof beyond a reasonable doubt that Sarausad knew that Ronquillo intended to commit murder.

b. Likelihood of Misapplication

[13] Establishing that the jury instructions were ambiguous, and that the jury could therefore have misunderstood them, is not enough to establish a constitutional violation under *Estelle*. Sarausad must also establish that there is "a reasonable

likelihood that the jury *has applied* the challenged instruction in a way that violates the Constitution." *Estelle*, 502 U.S. at 72 (emphasis added, internal quotation marks omitted). Under *Estelle*, we ask whether there is a "reasonable likelihood" that the jury applied the instruction in a way that relieved the State of its burden to prove beyond a reasonable doubt every element of the crime of accomplice liability for murder under Washington law. *Id.* A defendant "need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction" in order to satisfy the "reasonable likelihood" standard. *Boyde*, 494 U.S. at 380. For four reasons, we believe the "reasonable likelihood" standard has been met.

[14] First, the evidence supporting the conclusion that Sarausad knew that Ronquillo intended to commit murder on the return trip to Ballard High School was somewhat thin. As indicated above, there was no direct evidence that Sarausad knew that Ronquillo intended to commit murder, and the Washington Court of Appeals on direct review overstated the strength of the limited circumstantial evidence. We described that evidence above from the perspective of a *Jackson* analysis, viewing it in the light most favorable to the prosecution. Even described from that perspective the evidence against Sarausad was thin. But there was also evidence that contradicted or minimized the strength of the evidence, which we did not describe.

The dissent appears to misunderstand the import of our argument that the evidence against Sarausad was thin. We do not claim that the weakness of the evidence caused the jury to

misunderstand the instructions. Rather, we contend that the fact that the jury convicted Sarausad despite the thin evidence that Sarausad knew of Ronquillo's intent to commit murder suggests that the jury incorrectly believed that such proof was not required.

[15] Second, the prosecutor argued clearly and forcefully for the "in for a dime, in for a dollar" theory of accomplice liability. The prosecutor could not have been clearer in her explanation of that theory. For example, she argued to the jury in rebuttal:

> And I've told you the old adage, you're in for a dime, you're in for a dollar. If their logic was correct, they're not ever an accomplice to anything. The getaway driver for a bank robbery would say, "I just told him to rob them, I didn't tell him to shoot him, I didn't do anything." The example I gave you earlier, "I just told my friend to hold the arms down of this person while he hit him, I didn't tell him to kill him, I'm not guilty of anything." If you're in for a dime, you're in for a dollar.

[16] Third, in its notes sent to the judge during deliberations, the jury demonstrated substantial confusion about what the State was required to prove. In its first note, the jury asked for "clarification" on whether "'intent' appl[ied] to (the defendant only) or to (the defendant or his accomplice)?" In its second note, it asked, "Does intentional apply to only the defendant or only his accomplice?" Finally, in its third note, it wrote, "We are having difficulty agreeing on the legal definition

and concept of 'accomplice.' Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?"

[17] Fourth, after the Washington Supreme Court had clarified the meaning of the Washington statute in *Roberts* and *Cronin*, the Washington courts were able to deny Sarausad's PRP only after misstating the record and ignoring the prosecutor's emphatic and repeated "in for a dime, in for a dollar" argument. The Court of Appeals wrote, "[T]he prosecutor did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a fist fight, he nevertheless was guilty of murder." *Id.* at 318 (emphasis in original). It added, "Not once did the prosecutor suggest to the jury that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight. . . ." *Id.* at 319. The Court Commissioner of the Washington Supreme Court echoed the Court of Appeals. The Commissioner wrote, "The prosecutor never suggested Mr. Sarausad could be found guilty if he had no knowledge that a shooting was to occur." The statements of both the Court of Appeals and the Court Commissioner are plainly incorrect. As shown above, the record reveals that the prosecutor repeatedly made precisely the argument that the Court of Appeals and the Court Commissioner stated she did not make.

[18] Taken together, these reasons lead us to conclude that there is a "reasonable likelihood" that

the jury misapplied the ambiguous jury instructions, thereby relieving the State of its burden of proof of an element of the crimes with which Sarausad was charged. In so concluding, we consider neither Sarausad's counsel's declaration nor the two jurors' declarations supporting Sarausad's post-verdict motions for a new trial. The magistrate judge did consider the two jurors' declarations, but the district court, citing Federal Rule of Evidence 606(b), held that the magistrate judge erred in considering them. We agree with the district court that the declarations should not have been considered by the magistrate judge. *See* Fed. R. Evid. 606(b); *Tanner v. United States*, 483 U.S. 107, 120-27 (1987); *United States v. Rutherford*, 371 F.3d 634, 639-40 (9th Cir. 2004).

c. Harmless Error

[19] For the same reasons that we conclude that the second step of *Estelle* is satisfied, we conclude that the constitutional error was not harmless. The parties agree that the test applicable to this case is "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)) (internal quotation marks omitted). The error is not harmless if we are "in grave doubt as to the harmlessness of [the] error." *Roy*, 519 U.S. at 5 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995)) (internal quotation marks omitted). Sarausad's counsel stated during closing argument to the jury, "There is no question that Cesar Sarausad assisted Brian Ronquillo. That's beyond dispute. [H]e drove him to the scene. The question is whether Cesar had knowledge that his assistance

would promote or facilitate the crime [.]" Because the only disputed issue was whether Sarausad knew that Ronquillo intended to commit murder, relieving the State of its burden of proof on that issue was not harmless error.

C. Sarausad's Remaining Claims

Given our holding on Sarausad's *Winship/Sandstrom/Estelle* claim, we do not need to reach his remaining claims.

Conclusion

[20] We affirm the district court with respect to Sarausad's *Winship/ Sandstrom/Estelle* claim. We remand to the district court to grant the writ and to order Sarausad's release unless the State elects to retry him within a reasonable time.

AFFIRMED and REMANDED.

REINHARDT, Circuit Judge, concurring in part and dissenting in part.

I

I concur in the majority holding that the ambiguous jury instruction on accomplice liability, when viewed in the context of the entire trial, unconstitutionally relieved the State of its burden of proof. I therefore join the decision to affirm the district court's grant of habeas relief on that ground.

I dissent, however, from the majority's conclusion that the incredibly "thin" evidence the State presented at trial, maj. op. at 2591, was sufficient to support Sarausad's convictions under *Jackson v. Virginia*, 443 U.S. 307 (1979), and AEDPA. In fact, the evidence isn't thin. It's non-existent. The state court relied heavily on its determination that Sarausad heard a conversation about a plan to shoot the victim. Yet, there is absolutely *no* evidence in the record that he did. The majority itself points out that there was "no direct evidence" and "limited circumstantial evidence" of Sarausad's guilt. Maj. op. at 2591. Unlike the majority, I would take the next step-a step compelled by its own description of the evidence. I would hold, with the district court, that the evidence against Sarausad was insufficient, would, like the district court, grant relief on his *Jackson* claim, and, finally, would hold that the Double Jeopardy Clause bars the State from retrying him.

My disagreement with the majority on the *Jackson* issue relates both to its analysis and to its result. I strongly disagree with my colleagues'

assertion that "[w]e . . . evaluate a state court's resolution of a *Jackson* sufficiency-of-the-evidence claim *in all cases* under § 2254(d)(1) rather than § 2254(d)(2)." Maj. op. at 2562 (emphasis added). As I will explain, I see nothing in law or logic preventing us from evaluating *Jackson* claims under § 2254(d)(2), which authorizes us to grant habeas relief when the state court decision we are reviewing is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). In fact, in this case, and in others in which the question is whether the state court has correctly addressed the evidence in the record, we cannot properly analyze the state court decision without reviewing it under that provision. I do not think that any particular type of habeas claim, including a *Jackson* claim, must *in all cases* be considered under only (d)(1) or (d)(2). *See Weston v. Dormire*, 272 F.3d 1109, 1112 (8th Cir. 2001) (analyzing a *Jackson* challenge under both (d)(1) and (d)(2)). Based on the nature of the specific arguments Sarausad makes in this case, I believe that we are compelled to review his *Jackson* claim under § 2254(d)(2), as the district court did; I would therefore issue the writ on that ground. Having done so, I would correct the only error the able district judge made by holding in addition that, under the Double Jeopardy Clause, Sarausad may not be tried again. *See Burks v. United States*, 437 U.S. 1, 12-18 (1978).

II

The majority states that "§ 2254(d)(2) is not readily applicable to *Jackson* cases." Maj. op. at 2561. This is because, in the majority's view, "[a]

court under *Jackson* makes no 'determination of the facts'" in the way that § 2254(d)(2) contemplates. Maj. op. at 2561. This characterization of the judicial decisionmaking process in *Jackson* cases is mistaken. Without question, the state court makes factual determinations in the course of reviewing a conviction under *Jackson*. As with any legal claim, the court must first determine what the facts are and then decide whether those facts support the legal basis for relief asserted by the defendant. To be sure, the ultimate question in a *Jackson* case-whether the evidence is sufficient to support the verdict-is a legal one. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995). This observation, however, does not imply that the state court makes no "determination of the facts" on the way to rendering its legal decision. The state court must, after viewing the material in the record in the light most favorable to the prosecution, decide what the "evidence" is before it can assess whether a rational factfinder could find the defendant guilty. It does so by reviewing the record and determining the relevant facts, often by drawing the inferences it concludes are appropriate. An unreasonable determination of what the evidence is-how it is properly to be characterized-may, as here, lead the state court to err in answering the ultimate legal question of sufficiency. It is therefore that determination-what the "evidence" is-that a federal habeas court may review, even if deferentially, under § 2254(d)(2). Viewing the evidence favorably to the prosecution does not, as the majority suggests, somehow relieve the state court of its obligation to make the determination of what the "evidence" is: it simply describes the way in which the court goes about performing that task.

It is true that in adjudicating a *Jackson* claim a state court need not actually determine factual conflicts in the record, or, put another way, that it must deem evidentiary conflicts to be resolved in favor of the state. *See Wright v. West*, 505 U.S. 277, 296-97 (1992) (plurality opinion). A state court may not, however, do what the state court did here: it may not, when determining whether to uphold a conviction, rely on "evidence" that does not appear in, or is contrary to, the record. If, for example, one witness testifies that the defendant pulled the trigger, while another witness testifies that he did not, the state court may credit only the first witness's testimony in determining whether the evidence is sufficient. It may *not*, however, determine that a witness testified that the defendant pulled the trigger-and that this testimony provides the basis for upholding a guilty verdict-if *no* witness actually so testified. To do so would not be to view the evidence in the light most favorable to the prosecution, but actually to misstate what the evidence is. When a state court commits such an egregious error, a federal court on habeas review need not, indeed may not, ignore it. If the state court's error in determining the facts was both critical and objectively unreasonable, habeas relief may be granted on a *Jackson* claim, just as it may in a case raising any other type of constitutional claim. *See, e.g., Kesser v. Cambra*, 465 F.3d 351, 353 (9th Cir. 2006) (en banc) (granting habeas relief on a *Batson* claim because the state court decision resulted from an unreasonable determination of the facts). Determining that nonexistent facts exist (and then relying on them) of course involves an "unreasonable determination of the facts," not an unreasonable

application of the law, and thus is properly addressed under § 2254(d)(2), not (d)(1).[1]

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[1] The majority is completely mistaken in asserting that *Juan H. v. Allen III*, 408 F.3d 1262 (9th Cir. 2005) (as amended), *cert. denied*, 126 S. Ct. 1142 (2006), and 126 S. Ct. 1145 (2006), previously decided that we may analyze *Jackson* claims only under § 2254(d)(1) and never under (d)(2). The open question that *Juan H.* resolved was not whether we should apply (d)(1) instead of (d)(2), but whether AEDPA affected our review of *Jackson* claims at all-whether the extra layer of deference it requires is afforded in insufficiency of the evidence cases.

In *Bruce v. Terhune*, 376 F.3d 950 (9th Cir. 2004), one of the cases we cited in *Juan H.* as leaving the question open, we noted that "[t]he question whether AEDPA requires an additional degree of deference to state court resolution of sufficiency of the evidence claims is unsettled in our circuit." *Id.* at 957. In *Bruce* we cited two post-AEDPA decisions that had reviewed *Jackson* claims without applying any extra deference as well as one decision that had noted in dicta that additional deference was appropriate. See *id.* (citing cases). This was the conflict that *Juan H.* resolved. Neither *Bruce* nor *Juan H.* even remotely suggests that a review of a *Jackson* claim under (d)(2) would be inappropriate. Nor does any of the four out-of-circuit cases that *Juan H.* cites, and on which the majority now relies, in any way suggest as much.

There is, of course, no suggestion in *Juan H.* that the petitioner argued that the state court had determined any material facts unreasonably. *Juan H.* merely holds that we cannot review *Jackson* claims under AEDPA by conducting, as some of our prior decisions had, a straight application of *Jackson*. Although *Juan H.* tells us that under AEDPA, extra deference is required, *Juan H.* takes no position on whether, in a case presenting (d)(2) arguments, that deference may be paid under (d)(2) instead of (d)(1). Indeed, although the petitioner in *Juan H.* did not argue that his conviction stemmed from unreasonable factual determinations, we expressly noted in that case that "under § 2254(d)(2), a federal court may also grant a writ of habeas corpus if a material factual finding of the

If the state court's factual determinations are not objectively unreasonable, however, or if the petitioner does not challenge them, we may not ignore what the state court found the facts to be and analyze the record for ourselves.[2] We must, for purposes of § 2254, accept its findings as correct. *See Taylor*, 366 F.3d at 1000 ("Once the state court fact-finding process survives [review for unreasonableness under § 2254(d)(2)]-or in those cases where petitioner does not raise [such a] challenge to the facts as found by the state court-the state court's findings are dressed in a presumption of correctness. . . ."). We may then proceed under § 2254(d)(1) to determine whether the state court unreasonably applied *Jackson* in concluding that the evidence-as that court found it-was sufficient to support the verdict.[3]

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state court reflects 'an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" *Juan H.*, 408 F.3d at 1270 n. 8 (quoting § 2254(d)(2)). We did not suggest that the principle we had just announced-which follows directly from the statutory text-is inapplicable to *Jackson* claims, one of the very claims we were considering in *Juan H.*

[2] If "the state court should have made a finding of fact but neglected to do so," we may make the finding ourselves. In such a case, the state court's error is treated as an unreasonable determination of the facts under § 2254(d)(2). *See Taylor v. Maddox*, 366 F.3d 992, 1000-01, 1008 (9th Cir. 2004).

[3] In such cases, we must presume that the state court's factual determinations are correct. They may be rebutted, however, in what we term an "extrinsic" challenge, by clear and convincing evidence presented for the first time in federal court. See § 2254(e)(1); *Taylor*, 366 F.3d at 1000.

Jackson challenges in general are permissible under both (d)(1) and (d)(2), but these two types of challenges are different in kind. Assuming that the case does not involve new evidence presented for the first time in federal court, a petitioner bringing a *Jackson* challenge under (d)(1) argues that, *accepting the state court's factual determinations as correct*-that is, accepting the state court's characterization of what the evidence is-the state court applied *Jackson* in an "unreasonable" manner in concluding that such evidence was sufficient to show the defendant's guilt beyond a reasonable doubt. *See, e.g., Torres v. Mullin*, 317 F.3d 1145, 1151 (10th Cir. 2003) (noting intracircuit split regarding treatment of *Jackson* cases under AEDPA; analyzing *Jackson* claim under (d)(1) because "*[i]n this instance*," the petitioner "does not contend that the [state court's] factual findings are erroneous" but only that "the court's ultimate conclusion-that the evidence is sufficient to support his . . . convictions-constitutes an unreasonable application of *Jackson*" (emphasis added)). A challenge under (d)(2), by contrast, asserts that, on the basis of the trial record, the state court's factual determinations-its characterizations of the evidence-are "unreasonable" (not just wrong) and must be set aside, *see Taylor*, 366 F.3d at 1008, and that on the basis of the facts as properly determined, the evidence is insufficient under *Jackson* to convict. Of course, in some cases a petitioner may argue that the state court both applied the law and determined the facts in an unreasonable manner, bringing challenges under both § 2254(d)(1) and (d)(2), and in such cases both provisions will be implicated.

In actuality, in reviewing Sarausad's *Jackson* claim, the majority employs § 2254(d)(2) although it

denies doing so at every step. The majority spends five pages criticizing the state court's most important factual determination-that the shooting was discussed in Sarausad's car during the return trip to the school-concludes that the determination was "objectively unreasonable," and sets the determination aside. Maj. op. at 2565-67. Without doubt, such actions may be undertaken only under § 2254(d)(2), not (d)(1). *See Taylor*, 366 F.3d at 1008. In other words, after asserting that "§ 2254(d)(2) is not readily applicable to *Jackson* cases," maj. op. at 2561, the majority readily applies it.[4] Why the majority insists on asserting that § 2254(d)(2) is out of reach for *Jackson* claims, then uses that very provision *sub silentio* for the limited purpose of setting aside a particular factual determination, while continuing to maintain that the provision may not serve as the statutory basis for habeas relief, simply escapes me. The reason for the majority's assertion is particularly difficult to understand as AEDPA itself creates no hierarchy between (d)(1) and (d)(2), and as (d)(2) has served as the sole basis for habeas relief in other decisions of this court. In short, the majority actually holds that "a material factual finding of the state court" is objectively unreasonable"; it may then "grant a writ of habeas corpus" under § 2254(d)(2). *See Juan H.*, 408 F.3d at 1270 n.8. For reasons I am unable to grasp, however, the majority refuses to do so on the basis of an

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[4] The majority's decision to set aside an objectively unreasonable state court factual determination also belies its unfounded assertion that state courts adjudicating *Jackson* claims make no factual determinations (or at least no factual determinations of the type cognizable under § 2254(d)(2)) to begin with.

imagined categorical bar against issuing the writ under that section in cases involving *Jackson* claims.

III

Sarausad's *Jackson* challenge belongs under § 2254(d)(2). While legal questions are ultimately involved, the core issue in Sarausad's claim concerns the state court's adoption of facts purportedly from, and characterization of facts purportedly in, the record. Sarausad's habeas argument centers on a number of factual matters as to which he contends the state court reached an objectively unreasonable determination, although one such wholly unwarranted and unreasonable factual determination is clearly dispositive of the outcome.

The magistrate judge, in findings the district court adopted, correctly understood that Sarausad was asserting a *Jackson* challenge under § 2254(d)(2), explicitly finding that Sarausad had satisfied that provision. She wrote, unequivocally, that "[t]he [state] appeals court's conclusion that the cited evidence amounted to circumstantial evidence from which the jury could infer that petitioner knew of the gun was based on an unreasonable determination of the facts, in light of the testimony. 28 U.S.C. § 2254(d)(2)." Later in her report, the magistrate judge reiterated that "the court's presumption that the jurors [found that Sarausad knew that one of his passengers had a gun] was based on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)." On appeal, the section of Sarausad's opening brief that addresses the AEDPA standard argues that "[t]he Washington court's analysis depends on a patchwork of multi-

tiered and strained inferences." The brief makes a number of arguments that the state court misapprehended the record or drew factual conclusions that were unsupported by sufficient evidence. These are (d)(2) arguments. *See Taylor*, 366 F.3d at 999, 1001.

It is our duty, then, in my opinion, to decide whether Sarausad's claim under § 2254(d)(2) has merit. The magistrate judge's extensive analysis of the evidence, as well as an independent review of the record, leads to the inevitable conclusion that the state court's factual determinations, which formed the basis for its rejection of Sarausad's *Jackson* claim, were objectively unreasonable, and that no justification for reversing the district court's decision exists. Indeed, after analyzing under (d)(2) each of the factual determinations on which the state court based its legal conclusion, and after perusing the record independently, I believe that there is virtually no "evidence," direct or circumstantial, as to Sarausad's purported knowledge that is not a product of the state court's unreasonable determination of the facts.

In *Taylor v. Maddox*, we interpreted § 2254(d)(2), which, we explained, covers claims in which a petitioner "challenges the state court's findings based entirely on the state record." 366 F.3d at 999. We deemed such claims "intrinsic" challenges, and contrasted them with "extrinsic" attacks in which a petitioner seeks to overturn state court factfinding on the basis of evidence presented for the first time in federal court. *Id.* at 1000. Specifically, we wrote that state court findings may be unreasonable under § 2254(d)(2) where, *inter alia*,

"the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." *Id.* at 1001. "Such a challenge may [also] be based on the claim that the finding"-not to be confused with the verdict itself-"is unsupported by sufficient evidence." *Id.* at 999.[5] Finally, "[w]hen we determine that state-court fact-finding is unreasonable," we continued, "we have an obligation to set those findings aside and, if necessary, to make new findings." *Id.* at 1008. In performing our (d)(2) review, we of course give substantial deference to the state court findings. In *Taylor*, we applied the requisite deference and issued the writ under § 2254(d)(2), as the magistrate judge implicitly did here. The *Taylor* analysis fits the facts and circumstances of this case to a "t."

The state court's key factual determinations in this case cannot withstand the deferential "intrinsic" review prescribed in *Taylor*. In its most important finding, the state court concluded that "Gosho and Marckx testified that 'capping' was discussed on the return trip to the school."[6] *Sarausad v. Washington*,

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[5] Although § 2254(e)(1) accords state court factual determinations a "presumption of correctness" rebuttable only by "clear and convincing evidence" (introduced at the federal habeas proceeding), these commands "do not apply to a challenge that is governed by the deference implicit in the 'unreasonable determination' standard of *section 2254(d)(2)*." *Id.* at 1000. That is, § 2254(e)(1) does not apply to challenges brought under § 2254(d)(2).

[6] "Capping" is shooting. Thus the purported testimony was that the subject of shooting was discussed in Sarausad's car when Sarausad and the others were in the vehicle on the way to the site of the offense.

39 P.3d 308, 319 (Wash. Ct. App. 2001). This fact, if true, would lend strong support to the State's argument that Sarausad knowingly facilitated the shooting-it clearly "goes to a material factual issue that is central to petitioner's claim." *Taylor*, 366 F.3d at 1001. Without this finding, there is unquestionably insufficient evidence under *Jackson* of the only disputed element of the case-whether Sarausad knew of the intended criminal act. As the magistrate judge demonstrated, even under the deferential standard prescribed in *Taylor*, the state court's "capping" determination was objectively unreasonable under § 2254(d)(2), and must be set aside. Indeed, as the majority concludes, maj. op. at 2565, 2567, neither Gosho nor Marckx actually testified, as the state court found each did, that "capping" was "discussed" in Sarausad's car. I agree with the majority that the state court's determination to the contrary-that is, its determination that two witnesses testified to damning facts to which they did not in actuality testify-is, therefore, obviously unreasonable and must be set aside. *See* maj. op. at 2569-70. I would do so, however, under § 2254(d)(2), not (d)(1).

In another factual determination-this time one on which the majority does rely, maj. op. at 2572-the state court found that Ronquillo, the shooter, "tied a bandana over the lower part of his face." *Sarausad*, 39 P.3d at 319. The State seizes upon this finding to argue that, because it takes more than a moment to tie a bandana, the occupants of Sarausad's car, including Sarausad (who was driving), had warning that a shooting was going to occur. Yet all of the car's occupants testified that they did not see Ronquillo put on the bandana. Instead, the record contains

several references to "pulling the bandana on," and the magistrate judge, after carefully reviewing the record, characterized the action that way. As the magistrate judge concluded, the record contains no support for the assertion that Sarausad saw Ronquillo don the bandana. The difference between "tying" a bandana around one's head and simply "pulling" up a pre-tied bandana may seem slight, but it is enormously important in the context of this case. Without the state court's wholly unsupported-and thus objectively unreasonable, *see Taylor*, 366 F.3d at 999-determination that Ronquillo tied the bandana on in a way that Sarausad would have seen, the State's case, which already lacks sufficient evidence in the absence of the erroneous "capping" determination, falls even farther short of meeting the *Jackson* standard. All this, of course, is without even considering that the inference that the state court drew as to guilt from the wearing or purported tying on of a bandana is, as the magistrate judge found, wholly speculative. *See United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986) ("[M]ere suspicion or speculation cannot be the basis for creation of logical inferences.").

The state court also found that "Sarausad . . . drove the car in such a manner as to facilitate a drive-by shooting, not in such a manner as to stop, park the vehicle and engage in fisticuffs." *Sarausad*, 39 P.3d at 319. This finding, on which the majority relies, maj. op. at 2571, also goes to a material factual issue. The magistrate judge ruled this finding unreasonable because it was "an incorrect characterization of the complete testimony." The only evidence lending support to the state court's finding is the testimony of one witness, James Cooke, who

described Sarausad's driving as "swooping." Yet Cooke admits that in his initial statement to the police he did not describe the driving as "swooping." In addition, Cooke stated that he was directly behind Sarausad's car, but every other witness testified that Vicencio's car was behind Sarausad's. Cooke also stated that when Sarausad sped off, there was no other car following. Again, every other witness testified to the contrary. Multiple witnesses described the path of Sarausad's car in a manner that was consistent with stopping to get out. Furthermore, as the State conceded at oral argument before this court, even if Sarausad did "swoop," such driving was just as consistent with a planned fistfight as it was with a drive-by shooting. *See United States v. Bautista-Avila*, 6 F.3d 1360, 1363 (9th Cir. 1993).

The same is true, as the magistrate judge found, of Sarausad's "Are you ready?" comment. It is nothing but speculation to conclude that in uttering this question Sarausad meant "Are you ready to shoot someone?" rather than "Are you ready to fight?" Indeed, as the magistrate judge pointed out, the only witness who testified that Sarausad asked "Are you ready?" also testified that the Diablos had discussed returning to the school only for a fight, not for a shooting.[7]

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[7] The majority recounts Sarausad's "Follow me" comment as though it were an additional piece of evidence separate from the "Are you ready?" comment. The record is clear, however, that only one statement was uttered. One witness testified that the statement was "Are you ready?" while others testified that it was "Follow me" or "Follow us."

Without the "evidence" described above, and especially without the objectively unreasonable determination, wholly unsupported by the record, that a discussion of capping occurred in Sarausad's vehicle, there is almost nothing to suggest that Sarausad had the slightest indication or reason to believe that a shooting might take place. In its effort to reverse the district court, however, the majority seizes upon tiny shreds of "evidence" that even the state court itself deemed entirely unworthy of comment. In addition to lending little support to the case against Sarausad, many of these bits of evidence are unsupported by the record; one is even contradicted by the majority's own opinion.

For example, the majority suggests that Sarausad was present for a conversation in which Gosho discussed the possibility of a shooting, maj. op. at 2570, and that this provides a basis for the jury's verdict. As noted above, the majority itself set aside the state court's finding that the shooting was discussed *during the return trip to the school.* Now the majority suggests that Gosho discussed the shooting at the house, *before* the return trip, while "everybody" was present. Maj. op. at 2570. But the majority elsewhere points out that "if the conversation [about shooting] took place before the return trip to the school, as Gosho testified, there is no direct evidence that Sarausad heard it. Gosho never testified that Sarausad participated in or heard the conversation." Maj. op. at 2565. Furthermore, as the majority itself also reports, even if the conversation did occur within Sarausad's earshot, nobody, not even Gosho, took it seriously. Maj. op. at 2567.

As another example, the majority's opinion relies on the testimony of witnesses who claimed to have seen "a gun in the hands of a Diablo" during the first trip to the school. Maj. op. at 2570. However, as the magistrate judge concluded after a careful analysis of the record, "there was *no evidence* whatsoever that ties [the testimony] to whether[Sarausad] saw or knew of the alleged gun." The district court's factual finding is hardly clearly erroneous.

The majority's efforts to save the state court's decision from its unreasonable factual determinations by combing the record for inconsequential shreds of evidence that do not actually support an inference of guilt should not survive under § 2254(d)(2). Our review under (d)(2) is deferential, but "deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

IV

A final question is whether a petitioner who has satisfied § 2254(d)(2) must also show that the state court's application of law was "objectively unreasonable" under § 2254(d)(1), or instead may simply show that it constituted an error of constitutional magnitude. In the *Jackson* context, the question is whether a petitioner who demonstrates that the state court's material factual determinations were objectively unreasonable must then show that, if the state court were to reject his *Jackson* claim on the basis of the corrected facts, such rejection would constitute an objectively unreasonable application of *Jackson* under § 2254(d)(1). The answer must be "No." Section

2254(d) is written in the disjunctive: to obtain federal habeas relief, a petitioner must show, in addition to a substantive federal constitutional violation, see § 2254(a), either that the state court decision was contrary to or an unreasonable application of clearly established Supreme Court law OR that it was based on an unreasonable determination of facts. *See* § 2254(d). By AEDPA's own unambiguous terms, a petitioner need not satisfy both §§ 2254(d)(1) and (d)(2). *See Davis v. Grigas*, 443 F.3d 1155, 1158-59 (9th Cir. 2006) (remanding to determine whether petitioner was entitled to relief under § 2254(d)(2) after expressly holding that he was not entitled to relief under § 2254(d)(1)). Both this court and the Supreme Court have granted habeas relief under § 2254(d)(2) without even mentioning (d)(1) or suggesting that its strictures must also be satisfied. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2005); *Kesser*, 465 F.3d at 353; *see also Kesser*, 465 F.3d at 371-72 (Wardlaw, Circuit Judge, concurring) (joining the majority's opinion granting relief under § 2254(d)(2) and recommending relief "on the alternative ground" of § 2254(d)(1)).

The text and structure of AEDPA compel the conclusion that, where the state court decision rejecting a habeas petitioner's constitutional claim resulted from an unreasonable determination of the facts, the petitioner is entitled to relief if, under the corrected version of the facts, a constitutional violation would be established. The deference due state courts under AEDPA has already been given and is overcome at the time the factual determination is set aside. There is no need for a further exercise of deference, or, as it might be put, for double deference. *See, e.g., Rolan v. Vaughn*, 445

F.3d 671, 683 (1st Cir. 2006) (affirming habeas relief for petitioner who satisfied § 2254(d)(2) and under the correct facts established a *Strickland* violation); *id.* ("Because we conclude that the [state court's] findings of fact . . . were unreasonable and that, when looked at under the *Strickland* standard, [petitioner's] attorney's failure to investigate . . . fell below an objective standard of reasonableness, and that there is a reasonable probability that but for that failure the result would have been different, we will affirm the grant of the writ of habeas corpus by the District Court.").

Specifically, in the context of sufficiency of the evidence, after making a successful § 2254(d)(2) argument, a petitioner need not also show that if the state court had applied *Jackson* to the proper facts and reached the same result, its adverse decision would have been objectively unreasonable. A straight application of *Jackson* is all that is necessary once the requirements of (d)(2), and thus AEDPA, are satisfied. In *Juan H. v. Allen III*, we held that "after AEDPA, we apply the standard of *Jackson* with an additional layer of deference." 408 F.3d at 1274. But *Juan H.* is a(d)(1) case. It does not speak to how we apply *Jackson* after we have already satisfied the provisions of AEDPA under (d)(2) and have already given the state court's decision its proper level of deference. *Juan H.*, as well as (d)(1), is simply inapposite to a(d)(2) challenge or, to put it differently, the "additional layer of deference" required by AEDPA has already been given. No super-deference is required by that statute.

When a state court denies relief under *Jackson* on the basis of an unreasonably determined

set of erroneous facts, and we set aside those factual findings under (d)(2) after giving them the requisite deference, and we then substitute either our own factual determinations or accept the district court's, there is simply no state court decision that has considered the proper facts to which we can defer. *Cf. Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (applying de novo review under AEDPA to an issue that the state court "never reached"). No state court has decided whether the facts, as properly determined, satisfy the *Jackson* standard. AEDPA is about deferring to state courts, not about blindly raising the bar for habeas petitioners seeking to establish constitutional violations; were we to "defer" to a state court decision that does not exist, we would be doing just that.[8]

V

The State presented insufficient evidence in this case to allow a rational factfinder to find Sarausad guilty of second-degree murder and attempt beyond a reasonable doubt. The contrary decision of the Washington Court of Appeals was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). Accordingly, we are required to grant relief on Sarausad's *Jackson* claim

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[8] Even if we did conclude, contrary to statutory text and structure, that a petitioner who satisfies § 2254(d)(2) must subsequently satisfy § 2254(d)(1) in order to obtain relief, I would still issue the writ on Sarausad's *Jackson* claim. A state court decision upholding Sarausad's conviction on the basis of the evidence that remains after the unreasonable factual determinations are set aside would constitute an objectively unreasonable application of *Jackson*.

under § 2254(d)(2). I would do so without hesitation. I cannot join an opinion that characterizes the State's evidence as "thin"-as consisting of "no direct evidence" and "limited circumstantial evidence"-that describes in detail the state court's severe distortions and misstatements of the little potentially significant evidence that there is, and that then, relying on shreds of gossamer that the state court deemed unworthy even of mention, holds the evidence to be sufficient to bar habeas relief and thus permits Sarausad's retrial in violation of the Double Jeopardy Clause. *See Burks*, 437 U.S. at 12-18. I dissent from the majority's holding on the *Jackson* claim.

BYBEE, Circuit Judge, dissenting.

This case comes to us through an unusual set of proceedings. After Washington courts denied direct review of Sarausad's appeal from his conviction, the Washington Supreme Court issued a "clarifying instruction" in *State v. Roberts*, 142 Wash. 2d 471, 14 P.3d 713 (2000), which was relevant to Sarausad's appeal. *Sarausad v. State*, 109 Wash. App. 824, 829, 39 P.3d 308, 311 (2001). In Sarausad's second appeal, brought through a personal restraint petition, the Washington Court of Appeals "reexamine[d] the record in light of *Roberts*," and confessed that in its prior opinion it "erred." *Id.* at 830, 837, 39 P.3d at 312, 315. On reconsideration, in a lengthy opinion, the Washington Court of Appeals held that the jury instructions given in Sarausad's case "complied with *Roberts* and the Washington accomplice liability statute." *Id.* at 838, 39 P.3d at 316. The Washington Supreme Court,

adopting a Commissioner's ruling citing *Roberts*, found that "the trial court correctly instructed the jury" on accomplice liability.

Notwithstanding the care with which the Washington courts reconsidered Sarausad's claims in light of this clarification in Washington law, the majority finds that Washington courts should not have been trusted with their own jury instructions. Relying on hornbook platitudes from *Estelle v. McGuire*, 502 U.S. 62 (1991), and *In re Winship*, 397 U.S. 358 (1970), the majority holds that the jury instruction at issue here was not only "ambiguous," Maj. Op. at 2590, and thus "'reliev[ed] the State of the burden of proof enunciated in *Winship*,'" *id.* at 2573 (quoting *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979)), but that there was a "reasonable likelihood" that the jury applied the instructions in an unconstitutional manner, *id.* at 2593. In so concluding, the majority implicitly finds that the jury instruction at issue "by itself so infected the entire trial that the resulting conviction violates due process," *Estelle*, 502 U.S. at 72, that we must override the findings of Washington courts to the contrary.

With all due respect to my colleagues in the majority, the judgment of the Washington courts bears no resemblance to the majority's description. The jury instructions at issue here were in all material respects identical to the Washington statute on accomplice liability and to a jury instruction specifically approved by the Washington Supreme Court in *Roberts*. Neither the statute nor the instruction is ambiguous. Moreover, the law the majority finds "clearly established" in *Estelle* and

Winship could not have put the Washington courts on notice that their jury instructions were "ambiguous." They could not have known that the instructions were an "objectively unreasonable" violation of the Due Process Clause. *Williams v. Taylor*, 529 U.S. 362, 409-11 (2000); *see also* 28 U.S.C. § 2254(d)(1). Lastly, there was not a "reasonable likelihood" of misapplication by the jury. I respectfully dissent in the majority's conclusion to the contrary.[1]

I

The instructions given at Sarausad's trial and at issue here are identical in all material respects to the Washington accomplice liability statute. Instructions 45 and 46, as given in this case, provided that:

> [No. 45] You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.
>
> [No. 46] A person is an accomplice in the commission of a crime if, with knowledge

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[1] I concur in the majority's characterization of our task under AEDPA in reviewing a state court's decision applying *Jackson v. Virginia*, 443 U.S. 307 (1979). I agree with the majority that our review of a state court's *Jackson* review occurs under 28 U.S.C. § 2254(d)(1). and not 28 U.S.C. § 2254(d)(2), *see* Maj. Op. at 2562. although I take issue with the majority's particular application of § 2254(d)(1).

> that it will promote or facilitate the commission of the crime, he or she either (1) solicits, commands, encourages, or requests another person to commit the crime or (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.
>
> However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Sarausad, 109 Wash. App. at 838 n.8, 39 P.3d at 316 n.8. Instruction 45 is, word for word, taken from subsections (1) and (2) of the Washington accomplice liability statute under which Sarausad was charged. WASH. REV. CODE § 9A.08.020.[2] Instruction 46 is,

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[2] Wash. Rev. Code § 9A.08.020 (1)-(2) provides, in pertinent part:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> . . . .
>
> (c) He is an accomplice of such other person in the commission of the crime.

with a modification that is not relevant here, identical to subsection (3) of the Washington statute:

> (3) A person is an accomplice of another person in the commission of a crime if:
>
> > (a) With knowledge that it will promote or facilitate the commission of the crime, he
> >
> > (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it; . . .
>
> . . . .[3]

Moreover, these instructions were not written for Sarausad's trial, but have been used in Washington for many years.[4] Instruction 46, for example, is nearly identical to instruction 8 given in *State v. Davis*, 101 Wash. 2d 654, 656, 682 P.2d 883, 884-85 (1984). This instruction was expressly

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[3] For convenience. I have *italicized* the words in instruction 46 that were added to § 9A.08.020(3), and I have [bracketed] the words that appear in § 9A.08.020(3) but were omitted in the instruction:

> A person is an accomplice [of another person] in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he *or she either* (1) solicits, commands, encourages, or requests [such other] *another* person to commit [it] *the crime* [;] or (2) aids or agrees to aid [such other] *another* person in planning or committing [it] *the crime*.

[4] Section 9A.08.020 was taken from the *Model Penal Code* 2.06 (1985). *See Roberts*, 142 Wash. 2d at 510, 14 P.3d at 735.

approved in *State v. Roberts*: "the jury instruction in *Davis*, unlike the jury instruction here, copied exactly the language from the accomplice liability statute: it allowed for a conviction as an accomplice if the accomplice acted 'with knowledge that it will promote or facilitate the commission of *the crime* . . . .'" *Roberts*, 142 Wash. 2d at 511-12, 14 P.3d at 736 (quoting *Davis*, 101 Wash. 2d at 656, 682 P.2d at 884).[5]

As a statement of Washington law, instructions 45 and 46 could not have been clearer. As we recently wrote in *United States v. Lyons*:

> The difficulty with [defendants'] challenge is that the court's instruction was a nearly verbatim quotation from *Madigan [v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 624 (2003)]. It is difficult to understand the claim that the jury instruction was "flatly prohibited by the Supreme Court in *Madigan*" when the instruction quite appropriately quoted the controlling law.

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[5] The majority incorrectly states that "[a]t the time of the trial, it was widely thought that Washington law did not require the accomplice to know what particular crime the principal intended to commit." Maj. Op. at 2574. In *In re Domingo*, the Washington Supreme Court expressly clarified that *State v. Cronin*, 142 Wash 2d 568, 14 P.3d 752 (2000), and *Roberts*, 142 Wash. 2d 471, 14 P.3d 713 (2000), did not effect a substantial change in accomplice liability law, because *Davis*, 101 Wash. 2d 654, 682 P.2d 883 (1984), and *State v. Rice*, 102 Wash. 2d 120, 683 P.2d 199 (1984), established that an accomplice must have general knowledge of the specific crime committed by the principal. *See* 155 Wash. 2d 356, 362-66, 119 P.3d 816, 819-21 (2005).

453 F.3d 1222, 1233 (9th Cir. 2006) (citation omitted), *amended by* 472 F.3d 1055 (9th Cir. 2007). As in *Lyons*, the only thing "difficult to understand" in this case is how the majority finds that an instruction that "quite appropriately quoted the controlling law" is ambiguous.

II

Tracing the history of Washington state courts on the issue reveals that the instructions in this case avoid past infirmities and reflect the endorsed approach. The instructions here completely satisfy the Washington Supreme Court's concerns in *Roberts*. Roberts argued that the instruction on accomplice liability given at his trial permitted the jury to convict him if he had general knowledge that his accomplice might commit *any* crime and not just *the* crime charged. *See Roberts*, 142 Wash. 2d at 509, 14 P.3d at 734-35. The instruction given in Roberts's case was materially different from the instructions given here and in *Davis*. The faulty instruction in *Roberts*, with key words italicized by the Washington Supreme Court, provided:

> You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *a crime*.
>
> A person is an accomplice in the commission of a crime, whether present at the time of its commission or not, if, with knowledge that it will promote or facilitate *its commission*, he

> either: (a) solicits, commands, encourages or requests another person to commit the crime; or (b) aids another person in planning or committing the crime. . . .

Id. at 510, 14 P.3d at 735. The material distinction between the *Roberts* instruction and the Washington accomplice liability statute was the use of "a crime," as opposed to "the crime" in the first paragraph of the jury instruction. *Id.* (pointing to "the phrase 'a crime' in the first paragraph of instruction 7" and contrasting it with "the phrase 'the crime' in the parallel portion of the statute, RCW 9A.08.020(2)(c)"). According to the court, "'the crime' means the charged offense." *Id.* Through that language, the legislature "intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge.'" *Id.* at 511, 14 P.3d at 735 (referring to WASH. REV. CODE § 9A.08.020). By contrast, the instruction given in Roberts's case "essentially allowed the jury to impose strict liability on Roberts" and "improperly departed from the language of the statute." *Id.* at 511, 14 P.3d at 735-36.

The Washington Supreme Court approved the jury instruction in *Davis* because it was "copied exactly" from the statute itself. *Id.* at 511-12, 14 P.3d at 736. The Court emphasized that *Davis* did "not impose strict liability on accomplices for any and all crimes but merely reaffirm[ed] our longstanding rule that an accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *Id.* at 512, 14 P.3d at 736.

Roberts was followed by *State v. Cronin*, 142 Wash. 2d 568, 14 P.3d 752 (2000). In Cronin's case, the jury was issued the following instruction on accomplice liability:

> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he either: (1) solicits, commands, encourages or requests another person to commit the crime; or (2) aids or agrees to aid another person in committing a crime.

Id. at 576-77, 14 P.3d at 756-57. Again, the court invalidated the jury instruction based on the use of the term "a crime." Citing *Roberts*, the court concluded that "the fact that a purported accomplice knows that the principal intends to commit 'a crime' does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal." *Id.* at 579, 14 P.3d at 758. Instead, "in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged." *Id.* Consequently, the instructions in Cronin's case were found "legally deficient." *Id.* It is not clear which reference to "a crime" was most crucial to the court, however one can surmise that it was likely the third instance, which allows conviction based only on "knowledge that it will promote or facilitate the commission of *a crime*." *Id.* at 576-77, 14 P.3d at 756 (emphasis

added). This aspect of the instruction would not require knowledge of the specific crime to be committed, and would fail the rigid standard expressed in *Roberts*.

There is no question that the jury in Sarausad's case was properly instructed. The instruction mimicked the statute itself. The instruction suffered from none of the deficiencies identified in *Roberts* and *Cronin* because the jury was first instructed that it could not convict Sarausad unless it found that Sarausad was "an accomplice of such other person in the commission of *the crime*." *Sarausad*, 109 Wash. App. at 838 n.8, 39 P.3d at 316 n.8 (emphasis added). For that reason, it does not suffer from the infirmity within the *Roberts* instruction. The jury was further instructed that Sarausad was an accomplice if he acted "with knowledge that it will promote or facilitate the commission of the crime." *Id.* (emphasis added). Because of the specificity here, the instruction was not invalid like that in *Cronin*. Thus, the judgment of the Washington Court of Appeals that "the [trial] court properly instructed the jury as to the law of accomplice liability" is plainly correct, *id.* at 843, 39 P.3d at 318-19, as is the conclusion of the Washington Supreme Court that "the trial court correctly instructed the jury that it could convict Mr. Sarausad of murder or attempted murder as an accomplice only if it found he knowingly aided in the commission [of] 'the' crime charged."

III

Notwithstanding the clarity of the Washington courts' rulings in *Roberts*, *Cronin*, and *Sarausad*, the majority sows confusion where none exists. The

majority notes that the first issue under *Estelle v. McGuire*, 502 U.S. 62 (1991), is "whether the jury instructions were ambiguous" and concludes that "the jury instructions were, at the very least, ambiguous." Maj. Op. at 2585, 2590. With all due respect, the majority has read neither the instructions nor *Roberts* closely enough.

The majority observes that the instruction found deficient by the Washington Supreme Court in *Roberts* was "*almost* identical" to instruction 45 given at Sarausad's trial. Maj. Op. at 2586 (emphasis added); *see also id.* at 2587 ("The only difference . . . is that the words 'the crime' . . . in Sarausad's case are replaced by the words 'a crime' . . . in *Roberts*."). The trick is the word "almost." The fact is, that in the ways in which it counts in Washington, Sarausad's instructions were *not* identical to the instructions given in *Roberts*. In *Roberts*, the instruction began "A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *a crime*." (Emphasis added). By contrast, instruction 45 in Sarausad's trial read "A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *the crime*." (Emphasis added). Unlike Sarausad's instruction, the *Roberts* instruction did not require knowledge of the commission of the specific crime; rather, it merely (and erroneously) required knowledge of "a crime." The critical difference between the two instructions is that the Sarausad instruction clearly attaches knowledge to the specific crime, whereas the *Roberts* instruction seems to attach knowledge to any crime. Then, the words "its commission" in the *Roberts* instruction compound the

problem. In *Roberts*, the instruction provides "A person is an accomplice in the commission of a crime . . . if, with knowledge that it will promote or facilitate *its* commission. . . ." (Emphasis added). "Its" refers back to "a crime." Had "its" referred back to "the crime," and not "a crime," then the *Roberts* instruction would have correctly stated Washington law. But Sarausad's instruction avoids this problem altogether because it explicitly requires knowledge of the commission of "*the* crime." The majority minimizes the difference between the terms "a crime" in the *Roberts* instruction and "the crime" in Sarausad's instruction, commenting that "th[is] simple change . . . does not . . . make the jury instructions . . . unambiguous." Maj. Op. 2587. However, the distinction is critical in Washington law, and it is widely understood, across *Roberts*, *Cronin*, and *Davis*, that it makes the difference in the accomplice liability instruction. Therefore, in no way does the same "basic problem" remain here as in *Roberts*. *See* Maj. Op. 2587. That's what *Roberts* was all about, and it fully explains the Washington courts' rulings in this case as well.

The contrast between the two instructions becomes even more evident when they are read in context with the preceding instruction in each case. In *Roberts*, the jury was instructed that "a person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *a crime*." *Roberts*, 142 Wash. 2d at 510, 14 P.3d at 735 (first emphasis added). This instruction incorrectly states Washington law because the second reference to "a

crime" suggests that *any* crime committed by the principal makes the accomplice strictly liable. In Sarausad's case, however, the jury was instructed that "a person is guilty of *a crime* if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of *the crime*." *Sarausad*, 109 Wash. App. at 838 n.8, 39 P.3d at 316 n.8 (emphasis added).

When the instructions given in Sarausad's case are compared with the full instruction 7 in *Roberts*, the majority's claim that the instructions are "almost identical" evaporates entirely. It is this comparison that reveals the crucial ambiguity in the *Roberts* instruction. Because there was no similar ambiguity here, the controlling Supreme Court authority is not *Estelle*, but *Weeks v. Angelone*, 528 U.S. 225 (2000). In that case, the Supreme Court stated clearly that there is no constitutional violation when a "jury was adequately instructed, and . . . the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction." *Id.* at 234.

The majority attempts to classify Sarausad's instruction as less offensive than the *Roberts* instruction but still impermissibly ambiguous under *Estelle*. The majority admits that the correction from "a crime" to "the crime" means that "Sarausad's case does not invite an erroneous construction to the same degree as the flawed instruction in *Roberts*," but finds that the lack of "an explicit statement that an accomplice must have knowledge of the actual crime the principal intends to commit" makes the

instruction nonetheless defective. Maj. Op. at 2586, 2587. Of course, the majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts. In fact, the Washington Supreme Court's express approval of the *Davis* instruction belies the existence of such a requirement. *See Roberts*, 142 Wash. 2d at 511-12, 14 P.3d at 736. Contrary to the majority's argument, the corrected instruction alone in *Davis*, as here, sufficiently cured the defective language without any further explanation.

Lastly, the majority rests its finding of ambiguity on evidence it deems "most revealing"-that the Washington Court of Appeals initially determined Sarausad's instructions permitted his conviction as an accomplice "even if he did not know that Ronquillo intended to commit murder." Maj. Op. at 2588 (emphasis omitted). However, this early conclusion was later repudiated by the same court. The majority may claim that it is "hard pressed to read the very same statute and instructions as unambiguously instructing the jury to do precisely the opposite" now, Maj. Op. at 2588, but that is exactly what the Washington Court of Appeals' retraction forces us to do. Moreover, ambiguity should not be read into the court's correction, which unambiguously admits "we erred." *Sarausad*, 109 Wash. App. at 837, 844, 39 P.3d at 315, 319. The earlier Court of Appeals' erroneous understanding of accomplice liability, *see State v. Ronquillo*, 1998 WL 87641, at *9 (Wash. Ct. App. Mar. 2, 1998), did not affect the underlying jury instructions, which the later Court of Appeals deemed valid under a corrected view of the law, *see Sarausad*, 109 Wash.

App. at 844, 39 P.3d at 319 (finding that "the accomplice liability instructions were sufficient, and nothing that the prosecutor argued to the jury required a remedial or supplemental instruction from the trial court"). Although the court's view of the applicable law changed, neither the existence nor the content of the second decision reveals ambiguity as to Sarausad's jury instructions.

Moreover, there is no inconsistency in the Washington Court of Appeals acknowledging its own error but reaching the same judgment. *See* Maj. Op. at 2588. Under the Court of Appeals' initial reading of the statute, the instructions were correct. On reconsideration, the court had to determine whether those same instructions would satisfy a stricter reading of the statute, which they plainly did. In effect, the instructions would have satisfied *either* reading of the statute, although the *prosecutor* would have had grounds for objecting to the instructions at trial on the grounds that the instructions were too restrictive under the court's original (and erroneous) reading of the statute. The Washington Court of Appeals did exactly what it was supposed to do in this case.

IV

Even if the instructions given here were ambiguous, it was not objectively unreasonable under clearly established Supreme Court law for Washington courts to conclude that the instructions were correct and fair. *See* 28 U.S.C. § 2254(d)(1). We can only applaud the Washington courts for admitting their prior error and reconsidering their judgment in Sarausad's case. There is nothing in the decisions of the U.S. Supreme Court that should

have alerted those conscientious courts that they were violating the Constitution when they did so. Yet, effectively, the majority is prepared to tell the Washington courts that it was fine to admit error, and that it was fine to reconsider the judgment based on a revised understanding of Washington law, but that Washington courts should not have been trusted with Washington law because their judgment on reconsideration is "objectively unreasonable."

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we may grant habeas relief only if "the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Court has explained that "an unreasonable application of federal law is different from an incorrect application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (emphasis omitted). Accordingly, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, "[a] state-court decision involves an unreasonable application of [the] Court's clearly established precedents if the state court applies [the] Court's precedents to the facts in an objectively unreasonable manner." *Brown v. Payton*, 544 U.S. 133, 141 (2005); *see Sims v. Rowland*, 414 F.3d 1148, 1151-52 (9th Cir. 2005).

Specifically, "[a] state court decision is 'contrary to' clearly established Supreme Court

precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases or if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of the Supreme Court and, nevertheless, arrives at a result different from its precedent." *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004) (citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)) (other citations omitted). The "objectively unreasonable" standard of § 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings" and "demands that state court decisions be given the benefit of the doubt." *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Our inquiry begins and ends with the state court's determination, and affords it great deference in the process. Synthesizing these principles, to grant habeas relief under AEDPA, we must, first, identify a clearly established holding of the U.S. Supreme Court and, second, demonstrate that the state court's application of that holding is objectively unreasonable. *See Penry v. Johnson*, 532 U.S. 782, 792-93 (2001).

The majority musters two cases, *Estelle v. McGuire*, 502 U.S. 62 (1991), and *In re Winship*, 397 U.S. 358 (1970), for the proposition that an ambiguous jury instruction violates due process because it may "relieve[ ] the State of its burden to prove every element of the crime beyond a reasonable doubt." Maj. Op. at 2584. As a statement of general law, the proposition cited by the majority is not to be doubted. In this case, however, the proposition is not particularly useful because it is so general, and neither *Estelle* nor *In re Winship* provides any guidance for determining what is an

ambiguous instruction and at what point the ambiguity is of constitutional magnitude. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("Although [*Winship* states] an ancient and honored aspect of our criminal justice system, it defies easy explication.").[6] The majority quotes from *Estelle*, 502 U.S. at 72 ("[I]n reviewing an ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.") (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)), *see* Maj. Op. at 2573, but omits the sentence that followed it: "we also bear in mind our previous admonition that we 'have defined the category of infractions that violate "fundamental fairness" very narrowly,'" *id.* at 2573 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

The majority now claims that the statute itself is ambiguous and "that an instruction quote[d] from a statute does nothing to make either the statute, or the instruction, more understandable." Maj. Op. at 2588. The majority follows this statement with citations to cases in which specific intent in federal statutes was relevant. *See id.* at 2588-90. However,

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[6] If *In re Winship* has clearly established anything, it is that the state must prove every element of the offense beyond a reasonable doubt, including juvenile proceedings. *See* 397 U.S. at 363-64, 368. Sarausad does not contend, nor do I understand the majority to challenge, that the jury was not properly instructed with respect to *proof beyond a reasonable doubt*. *See Victor*, 511 U.S. 1 (considering the constitutionality of variations on that standard). I am not sure that citation to *In re Winship* contributes anything to Sarausad's particular challenge under AEDPA.

these cases are not helpful here because they tell us nothing about the Washington instructions at issue. More revealing is the step the majority does *not* take. While claiming that the Washington statute is ambiguous, the majority stops well short of claiming that the statute is unconstitutionally vague. Effectively, the majority suggests that the instructions could be improved and that this infirmity alone is sufficient to bring this case within *Estelle* or *In re Winship*.

Contrary to the majority's point is the Supreme Court's recent decision in *Brown v. Payton*, 544 U.S. 133 (2005). In *Brown*, a California death penalty case, the trial court gave a "catchall instruction" ("factor (k)") in the penalty phase that "repeated the text of the statute." *Id.* at 137. Payton asserted the instruction was ambiguous because it did not advise the jury that they could consider his postconviction conduct and because the prosecutor had misstated the law in his argument to the jury. *See id.* at 138-39. The California courts denied Payton relief, but we granted his petition for habeas relief under AEDPA because the trial court failed to correct the prosecutor's misstatement and because the "instruction was likely to have misled the jury and it was an unreasonable application of th[e] Court's cases for the California Supreme Court to have concluded otherwise." *Id.* at 138-39, 141. The Supreme Court reversed our judgment. Relying largely on *Boyde v. California*, just as the majority does here, *see* Maj. Op. at 2573-74, the Court observed that even if the California court's "conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review." *Id.* at 143.

Even accepting the broad statement from *Estelle* as "clearly established" law, the majority cannot, by any metric, demonstrate that the Washington courts' judgment in this case was an "objectively unreasonable" application of the Court's precedents in *Estelle* and *In re Winship*. As I have demonstrated, *supra*, there is not even a genuine ambiguity in the Washington instructions, much less one that is so obvious that it is "objectively unreasonable" of the Washington courts to neglect to correct it and requires our intervention. The majority has no cases to support its proposition, and no basis for its conclusion other than its own *ipse dixit*. In the end, the majority does not offer anything other than its own opinion to support its conclusion that the instruction is ambiguous. *See* Maj. Op. at 2590. Improving Washington's jury instructions is a noble enterprise, but it is not authorized by AEDPA.

V

Even if I thought there was some ambiguity in the instructions and that the Supreme Court's jurisprudence was sufficiently clear, I could not find that "there is a 'reasonable likelihood' that the jury misapplied the ambiguous jury instructions." Maj. Op. at 2593 (quoting *Estelle*, 502 U.S. at 72). The majority makes much of the fact that the jury asked the court three questions about the jury instructions during its deliberation. *See* Maj. Op. at 2592. But each time the jury asked a question, the court directed the jury's attention to the precise paragraph of a constitutionally adequate instruction. It is hornbook law that "[a] jury is presumed to follow its instructions . . . and is presumed to understand a judge's answer to its question." *Weeks*, 528 U.S. at

234. As the Supreme Court noted, "[t]o presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer." *Id.* The majority takes us one step closer to this reality.

The majority points to several concerns to rebut this presumption, but none comes close to kind of evidence needed to nullify the jury's verdict. First, the majority concludes that the "reasonable likelihood" standard is met because "the evidence against Sarausad was thin." Maj. Op. at 2591. This is a remarkable leap of logic to posit that there is a causal relationship between the strength of the government's case and the probability of jury confusion. The majority's assertion finds no support in the record, and there is simply no precedent in any court, let alone clearly established law of the Supreme Court, to suggest that a jury is more likely to misunderstand its instructions *because* the government's case is purportedly weak. We have previously concluded that an instructional problem is compounded by the thinness of the evidence, *see Lankford v. Arave*, 468 F.3d 578, 586-89 (9th Cir. 2006), but we have not, as the majority does here, used the thinness of the evidence to prove the existence of the instructional problem.

Second, the majority highlights that the prosecutor "clearly and forcefully" argued an "'in for a dime, in for a dollar' theory of accomplice liability." Maj. Op. at 2591. But the majority cannot know the impact of this argument on the jury, other than the fact that the jury returned a guilty verdict and the majority doubts that conclusion. Even if the prosecutor's statements were incorrect as a matter of

Washington law, the majority cannot avoid the fact that the jury was properly instructed and that we presume that the jury understood and followed those instructions. *See Weeks*, 528 U.S. at 234; *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).[7] While prosecutorial misconduct may be independent grounds for overturning a conviction, mere misstatements have no place in an inquiry into whether the jury was properly instructed (*Weeks*) or whether the instructions were ambiguous (*Estelle*). The majority cites no cases to support its theory, much less clearly established precedent from the Supreme Court.

Third, the majority asserts that "in its notes sent to the judge during deliberations, the jury demonstrated substantial confusion about what the State was required to prove." Maj. Op. at 2592. But juror questions in and of themselves are not evidence of constitutional error. *See Weeks*, 528 U.S. at 234-36. Rather, the relevant inquiry is whether the trial court properly responded to the jury's questions, which it did.

On the third day of its deliberations, the jury requested "clarification on instruction No. 11 & 12 Element (3); does the 'intent' apply to (the defendant only) or to (the defendant or his accomplice)?"

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[7] The presumption "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant." *Richardson*, 481 U.S. at 211. As such, the presumption favors the state when the instructions are correct and favors the defendant when the instructions are in error. *See, e.g., Martinez v. Garcia*, 379 F.3d 1034 (9th Cir. 2004).

Instructions 11 and 12 were the first-degree murder instructions, and not the accomplice liability instructions, which were 46 and 47. The judge then pointed the jury to the latter: "Refer to instructions 46 and 47 and consider your instructions as a whole." There was nothing erroneous about the judge's response, as he directed the jury to the specific instructions (35 instructions later) regarding accomplice liability as related to first-degree murder.

Three days later, on the sixth day of its deliberations, the jury sent the court the following note:

> Reference: Instruction 17 in "the crime of murder in the second degree (intentional)." Question: Does intentional apply to only the defendant or only his accomplice?"

The judge responded that the jury should "[r]efer to instructions 45 & 46 and consider the instructions as a whole." Instructions 45 and 46 were the accomplice liability instructions for the second-degree murder charge. There was nothing erroneous about the judge's response this time either, as he directed the jury to the specific instructions (28 instructions later) regarding accomplice liability as related to second-degree murder.

Finally, on the seventh day of deliberations, the jury sent the following note:

> We are having difficulty agreeing on the legal definition and concept of "accomplice." Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?

The judge again instructed the jury to "[r]eread instructions # 45, 46, 47 and 48, and consider your instructions as a whole." There was nothing erroneous about the judge's response, as he directed the jury to the specific and unambiguous instructions regarding accomplice liability.

The jury's questions are certainly understandable given the facts, the complexity of the issue, and the length of the jury instructions. The questions were discerning ones and demonstrate that the jury was proceeding deliberately and methodically. The questions were not the same inquiry repeated three times. The first question related exclusively to accomplice liability and *first*-degree murder, while the second question-raised three days later-related exclusively to accomplice liability and *second*-degree murder. The fact that the jurors deliberated for two full days before asking the second question indicates that the jury considered accomplice liability for the first-degree murder charge, and then moved on to the second-degree murder charge. These questions do not demonstrate a complete misunderstanding of accomplice liability.

To my mind, the third question is the only one that even potentially illustrates that the jury experienced some confusion on this issue. And we know that the jury had a difficult time agreeing on a definition of accomplice liability because it said so. There is nothing wrong with that; we permit juries to ask questions precisely so that a judge can direct them to the answer. The trial court performed by the book, directing the jury's attention to the relevant accomplice liability instructions, which were unambiguous and correct statements of Washington

law. The following day the jury returned a verdict. Under *Weeks*, our inquiry ends there.

Moreover, there is other evidence that shows that the jury was satisfied with the judge's directions and reached a reliable verdict. The jurors deliberated for some time after the judge's responses. *See Weeks*, 528 U.S. at 235 ("It is also significant . . . that the jurors deliberated for more than two hours after receiving the judge's answer to their question."). Further, "[t]his particular jury demonstrated that it was not too shy to ask questions, suggesting that it would have asked another if it felt the judge's response unsatisfactory." *Id.* at 235-36.

Fourth and finally, the majority points again to the prosecutor's "in for a dime, in for a dollar" argument, and suggests that "the Washington courts were able to deny Sarausad's PRP only after misstating the record and ignoring th[at] argument." Maj. Op. at 2592. However, the majority gives too much weight to its asserted chronology. Although accomplice liability was clarified in *Roberts* and *Cronin*, these cases did not rewrite Washington law. Rather, cases such as *Davis* established the requirement that an accomplice must have knowledge of the intended crime, and the jury instructions at Sarausad's trial reflect that long-standing principle. *See supra* at 2615 n.5. Therefore, the Washington courts were not in the position, as hinted by the majority, of needing to misstate the record to deny Sarausad's petition under changed law. Moreover, it is the province of these various Washington authorities to decipher the arguments made at Sarausad's trial. Although the majority may opine that "the prosecutor repeatedly made precisely

the argument that the Court of Appeals and the Court Commissioner stated she did not make," Maj. Op. at 2593, this conclusion is not for us to draw. Accepting the ultimate characterization by Washington authorities, I would find that the jury was properly instructed and, therefore, there is not a "reasonable likelihood" that the jury applied the instructions in an unconstitutional manner.[8]

* * * * *

In sum, the Washington courts' rulings are not "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C.§ 2254(d)(1). Sarausad's jury was properly instructed, and we are required to find that they followed their instructions, even when the case is close. I would reverse the judgment of the district court.

I respectfully dissent.

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[8] I object to the majority's sub-silentio reliance on post-deliberation affidavits from repentant jurors. *See* Maj. Op. at 2579. Although the majority ultimately disclaims reliance on the affidavits, *see id.* at 2593, the majority protests too much. Even mentioning the affidavits is objectionable for all the reasons the *Federal Rules of Evidence* have emphatically rejected a juror's "testi[mony] as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions." FED. R. EVID. 606(b). We have held, for example, that Rule 606(b) "bars consideration of jurors' statements that they ignored the court's instructions and discussed a defendant's failure to testify during deliberations." *United States v. Rutherford*, 371 F.3d 634, 640 (9th Cir. 2004); *see also United States v. Falsia*, 724 F.2d 1339, 1343 (9th Cir. 1983). This "buyer's remorse" has the potential to turn justice on its head, as individual jurors, pursued by counsel and pressured to explain the verdict, are turned into witnesses and advocates.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CESAR SARAUSAD, *Petitioner*, v. CAROL PORTER, *Respondent*.	CASE NO. C02-2547C ORDER

I. INTRODUCTION

This matter has come before the Court on Petitioner's petition for habeas corpus. Petitioner, a state prisoner, filed his petition pursuant to 28 U.S.C. § 2254 to challenge his 1994 conviction on one count of second degree murder and two counts of second degree attempted murder. This matter was referred to the Honorable Monica J. Benton, United States Magistrate Judge, for a Report & Recommendation ("R&R"). The R&R was duly filed on October 13, 2004.

After a thorough review of the record, Judge Benton recommended that habeas relief be granted on the basis of two of Petitioner's four claims. Having made the determination that Petitioner was entitled to relief on these two claims, Judge Benton declined to consider his two remaining claims.

Both Petitioner and Respondent filed objections to the R&R. When objections are filed, the Court must make a de novo determination of those portions of the R&R to which objection has been made. 28 U.S.C. § 636(b)(1). Here, Respondent "the

"State") objected to Judge Benton's conclusion that Petitioner's due process rights had been violated because (1) "[t]he evidence was insufficient to support his convictions for murder and attempted murder" (R&R at 4), and (2) the jury instructions, the prosecutor's closing argument, and the trial court's refusal to clear away the jury's expressed confusion relieved the State of its burden to prove every element of the crimes beyond a reasonable doubt (*id.*) For his part, Petitioner objected to Judge Benton's recommendation that Petitioner be released on his convictions of second degree murder and second degree attempted murder unless the State elected to retry him.

Having conducted the required de novo review of the record, and for the reasons stated below, the Court hereby ADOPTS Judge Benton's R&R and GRANTS the § 2254 petition for a writ of habeas corpus.

II. ANALYSIS

As Judge Benton's R&R provides an exhaustive account of the facts of this case, the Court finds it unnecessary to provide those facts here. Instead, where necessary, the Court shall refer to the relevant portions of Judge Benton's R&R.

A. Sufficiency of evidence

The State contends that Judge Benton's R&R committed the following errors in concluding that the state courts unreasonably applied clearly established federal law with respect to the sufficiency of the evidence against Petitioner: (1) failing to state the proper standard under *Jackson v. Virginia*, 443 U.S. 307 (1979), for reviewing claims of insufficient

evidence; and (2) relying on extrinsic evidence, namely certain juror affidavits, in evaluating the sufficiency of the evidence. The Court addresses the first objection in this section. The second objection will be addressed in the next section.

Jackson clarified that the standard to be applied on review of a conviction for sufficiency of evidence is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. Judge Benton's R&R concluded "This court's review of the trial transcripts produces no evidence from which a reasonable jury could find, beyond a reasonable doubt, that the petitioner knew that anyone in his car was armed with a gun." (R&R at 18.) It is true that the R&R does not expressly state that it reviewed the evidence in the light most favorable to the prosecution. More specifically, however, the State objected to the fact that the R&R found that the facts established at trial could have supported an alternative version of events.

A finding that the facts could have supported an alternative version of events, standing alone, does not meet the *Jackson* standard. However, a finding that the facts could have supported an alternative version of events does speak to whether a rational trier of fact could have found the essential elements of the crime *beyond a reasonable doubt*, even taking the evidence in the light most favorable to the prosecution. After all, taking the evidence in the light most favorable to the prosecution does not require that a reviewing court *disregard* conflicting evidence. Here, having reviewed the trial record, the

Court must conclude that the nature of the evidence produced at trial, even considered in the light most favorable to the prosecution, does not support the prosecution's theory of the case *beyond a reasonable doubt*. This is not to say, of course, that the evidence does not support the prosecution's theory *at all*. It is merely to say that reasonable doubt still remains. Therefore, to the extent that the R&R erred in not considering the evidence in the light most favorable to the prosecution, having conducted its own review from the *Jackson* perspective, the Court agrees with and adopts the R&R's ultimate findings with respect to the insufficiency of the evidence.

B. State's burden of proof

Judge Benton also recommended that Petitioner be granted relief on the ground that Petitioner's due process rights had been violated because the State had been relieved of its burden to prove every element of the crimes beyond a reasonable doubt. The State particularly objected to the R&R's apparent interest in juror affidavits as evidence of juror confusion during deliberations.

To the extent that Judge Benton relied on the juror affidavits in question, she was in error. While she was correct that she was not bound by the state rule against considering post-verdict juror statements, she is bound by Fed. R. Evid. 606(b). This rule states that

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other

> juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b). This rule merely codified the long-standing principle that jurors may not impeach their own verdict. *See United States v. Weiner*, 578 F.2d 757, 764 (9th Cir. 1978) (citing *McDonald v. Pless*, 238 U.S. 264 (1915)).

The Court finds, however, that the R&R's ultimate finding that the jury was confused about the law of accomplice liability and therefore that the State had been relieved of the burden of proving every element of the crime beyond a reasonable doubt, is not affected by this error. Even omitting the objected-to juror affidavits from consideration, the Court finds that the record contains ample evidence that the jury was confused about what elements had to be established in order for Petitioner to be found guilty of second degree murder and second degree attempted murder. The jury's four inquiries about accomplice liability do not exist in a contextual vacuum – rather, they exist in the context of a case in which they were repeatedly told by the prosecutor that if Petitioner was "in for a dime, [he]

was in for a dollar." In particular, the Court agrees with Judge Benton that the jury's last question[1] was particularly troublesome. (*See* R&R at 16.) Having been "frankly invited . . . to [find that] because Petitioner was in for the 'dime' of driving his car past Ballard High School a second time, he was automatically in for the 'dollar' of the shooting, regardless whether he knew of the gun Mr. Ronquillo had in his car," (R&R at 16) the jury's questions show that their deliberations did not hold the State to its burden of proof beyond a reasonable doubt of *each element of the crime.*

In making this finding, the Court is not impugning the state courts' decision that the jury instructions correctly instructed the jury regarding Washington law on accomplice liability. Although the State interprets the R&R as criticizing the jury instructions (Resp.'s obj. at 23), the R&R expressly acknowledges the federal court is bound by the state supreme court's finding that the accomplice instruction was correct under state law (R&R at 29). However, the cumulative effect of the jury instructions, the prosecution's closing argument, and the trial court's repeated refusals to mitigate the jury's confusion was to relieve the State of its burden of proving, beyond a reasonable doubt, that Petitioner knew "that someone among the Diablos had a gun on the second trip to Ballard." (R&R at 29.) As the State itself points out, where jury

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[1] "We are having difficulty agreeing on the legal definition and concept of 'accomplice.' Question – when a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in that group?" (R&R at 16.)

instructions and prosecutor comments are in question, they each must be considered in the context of the entire trial. *See, e.g., Cupp v. Naughten*, 414 U.S. 141, 147 (1973) (stating that an allegedly defective jury instruction must be considered within the context of he jury instructions as a whole and in light of the entire trial record); *Darden v. Wainwright*, 477 U.S. 168, 179 (1986) (stating that prosecutor's comments should be considered in the context of the entire trial). Here, rather than having a mitigating effect, the context of the entire trial had a cumulative effect resulting in a violation of due process.

Due to the nature of the jury's questions and the context in which they were asked, the Court finds that the record shows that the State was relieved of its burden of proving every element of the crime beyond a reasonable doubt. For this reason, the Court adopts the R&R's ultimate findings and recommendations with respect to Petitioner's third claim for relief.[2]

C. Double jeopardy

The R&R recommended that Petitioner should be released from custody unless the State elects to re-try him on the second degree murder and second degree murder charges. Petitioner objected that because the R&R found that there had been insufficient evidence to convict him of these charges, that the Double Jeopardy Clause prevents the State from re-trying him.

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[2] Having found that Petitioner is entitled to relief on the basis of his first and third claims, the Court hereby declines to reach his second and fourth claims.

In general, the Double Jeopardy Clause does not bar the re-trial of a defendant who has succeeded in getting his conviction set aside for error in the proceedings below. *Burks v. United States*, 437 U.S. 1, 18 (1978). However, where the conviction was set aside on the sole ground that the evidence was insufficient to sustain the jury's verdict, the Double Jeopardy Clause bars a retrial on the same charge. *Id.* The Supreme Court clarified the impact of *Burks* in *Lockhart v. Nelson*, thus: "While [a reversal based solely on evidentiary insufficiency] is in effect a finding 'that the government has failed to prove its case' against the defendant, [a reversal based on trial errors] 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that he has been convicted through a judicial *process* which is defective in some fundamental respect.'" 488 U.S. 33, 40 (1988) (citing *Burks*, 437 U.S. at 15). The *Lockhart* Court reasoned that "permitting retrial in [the latter] instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtai[n] a fair readjudication of his guilt free from error.'" *Id.* at 42 (citing *Burks*, 437 U.S. at 15).

The question is whether the instant case is one where the State simply failed to prove its case against Petitioner, or whether Petitioner was convicted through a defective judicial process. This was a hybrid case, in which Petitioner was convicted on the basis of evidence insufficient to establish each of the elements of the offenses beyond a reasonable doubt. However, the State was relieved of its evidentiary burden through multiple defects in the

judicial process. For this reason, the Court finds that the re-trial of Petitioner on the second degree murder and second degree attempted murder charges would not be oppressive, but would rather serve his interest by affording him an opportunity to obtain a fair adjudication of his guilt free from error.

Accordingly, the Court adopts the Judge Benton's recommendation as to the form of the writ to be issued.

III. CONCLUSION

In accordance with the foregoing, the Court hereby ADOPTS Judge Benton's R&R in its entirety, with the exception of the R&R's consideration of the juror affidavits, and hereby ORDERS as follows:

(1) Petitioner's Petition for Writ of Habeas Corpus is GRANTED;

(2) Petitioner's convictions for second degree murder and second degree attempted murder are VACATED;

(3) Petitioner should be released from custody unless the State of Washington elects to re-try him, and that trial commences within 90 days after the entry of this order; and

(4) The Clerk is directed to send copies of this Order to counsel for each party and to the Honorable Monica J. Benton.

SO ORDERED this 10th day of January, 2005.

/s/ John C. Coughenour

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CESAR SARAUSAD Petitioner, v. CAROL PORTER, Respondent.	CASE NO. C02-2547C REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Cesar Sarausad is a state prisoner currently serving consecutive sentences totaling 328.5 months following his 1994 conviction on one count of second degree murder and two counts of second degree attempted murder.[1] Through counsel, he has filed this petition for habeas corpus, pursuant to 28 U.S.C. § 2254, to challenge those convictions. Respondent has filed an answer and supplemental response to the petition, and petitioner has responded to the answer. After careful consideration of the record and the memoranda of the parties, I conclude that an evidentiary hearing is not necessary, and that the petition should be granted. The state court's decision in this case was contrary to the clearly established law that "the Due Process

[1] Petitioner was also convicted of second degree assault (Count V), for which he was sentenced to a concurrent term of forty-five months. Petitioner has not challenged the assault conviction in this petition. Dkt. # 1, p. 6-10; Dkt. # 9, p. 47.

Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. 28 U.S.C. § 2254(d); *In re Winship*, 397 U.S. 358, 364 (1970).

II. FACTUAL BACKGROUND

The facts leading to petitioner's conviction were reported by the Washington State Court of Appeals, Division I:

> Cesar Sarausad II, Brian Ronquillo, and Jerome Reyes were charged with and tried together for first degree (premeditated) murder of Melissa Fernandes, attempted first degree murders of Ryan Lam and Tam Nguyen, and second degree assault of Brent Mason, all in the course of a drive-by shooting at Ballard High School on March 23, 1994. Brian Ronquillo, the shooter, was found guilty of one count of first degree (premeditated) murder, two counts of attempted first degree murder and one count of second degree assault while armed with a firearm. Cesar Sarausad, who drove the car to and from the shooting, was found guilty of the lesser-included offenses of one count of second degree (intentional) murder, two counts of attempted second degree murder, and second degree assault while armed with a firearm. The jury was unable to reach a verdict as to Jerome Reyes, and a mistrial was declared as to him.
>
> Sarausad, Ronquillo and Reyes were associated with a gang called the "23rd Street Diablos" (Diablos). Reyes told members of the

Diablos that, two days before the shooting, he had been chased from the vicinity of Ballard High School by members of a rival gang, the "Bad Side Posse" (BSP). Nine members of the Diablos went in two cars to Ballard High School to confront the BSP. Sarausad drove one of the cars.

The Diablos arrived at the school and confronted some members of the BSP. A shoving match ensued during which gang signs were flashed and harsh words were exchanged. The Diablos left after someone indicated that police were nearby.

The Diablos went to a member's house where they listened to music, ate and initiated a new member into the gang. Ronquillo obtained a handgun from a fellow Diablo and put it into his pants. The Diablos returned to Ballard High School, again riding in two cars. Sarausad drove again, and his car was in the lead. Ronquillo was in the front passenger seat with Sarausad. Three other Diablos were in the back seat of Sarausad's vehicle: Jerome Reyes, Luke Gosho and Michael Marckx. Marckx and Gosho both testified that "capping" (shooting) was mentioned during the trip back to the school. Upon approaching the school, the two carloads pulled side by side and there was a brief discussion. Sarausad said, "Are you ready?"

Ryan Lam, Tam Nguyen and Melissa Fernandes were standing outside the school when the two cars approached. Sarausad drove his car past the students, slowing

momentarily as Ronquillo, wearing a bandana tied over his nose and mouth, pointed a handgun out the open car window and pulled the trigger at least six and as many as ten times. According to a State's expert witness, the bullets were fired directly at the students. Lam and Nguyen ducked to the ground and were unscathed. Fernandes died the next day from a penetrating wound on the left side of her head. Brent Mason, another student in the vicinity, was hit in the leg by a bullet fragment.

Sarausad, still in the lead, sped away and the other vehicle followed. Some distance from the school, both cars stopped and Ronquillo transferred the gun to the other car.

Sarausad drove the Diablos that were in his care to Northgate Mall, dropped them off, and then drove home. The next day, after a discussion with Ronquillo, a fellow Diablo threw the chopped-up handgun into a lake, and it was never recovered.

The State's theory at trial, bolstered by testimony of an expert witness, was that gang mentality required the Diablos to regain respect after one of their own, Reyes, was chased out of BSP territory. The first trip to Ballard High School, ending abruptly as it did by reason of proximity of police, did not sufficiently serve that purpose, and so the gang went back to the school, this time to carry out a drive-by shooting---a certain means of regaining respect. The State entered into plea bargains with several of the gang

members, agreeing to reduce the charges against them in exchange for their truthful testimony at the trial of Ronquillo, Sarausad and Reyes, who, the State argued, were the primary instigators of the drive-by shooting.

The defense theories at trial were as follows: Ronquillo admittedly was the shooter but he neither premeditated nor intended to kill and was, therefore, only guilty of manslaughter. Sarausad and Reyes returned to the school expecting, at most, another shoving match or fist fight, had no idea whatsoever that Ronquillo had armed himself for the return trip and were totally and utterly dismayed when Ronquillo started shooting. Nothing was preplanned, there was no discussion of shooting anybody, nobody in Sarausad's car knew Ronquillo was armed and none of them saw Ronquillo tie on the bandana. Finally, the defense team argued that the gang members who testified for the State were bald-faced liears trying to save their own skins.

In re Saruasad, 109 Wn. App. 824, 830-32 (2001); Dkt. # 7, Exhibit 16.

III. PROCEDURAL HISTORY

Petitioner was sentenced to consecutive terms of 144 months, 92.25 months, and 92.25 months on the murder and attempted murder convictions, and a concurrent 45-month term on the assault charge. Dkt. # 7, Exhibit 1. The conviction was affirmed on appeal, and the Washington Supreme Court denied review. Dkt. # 7, Exhibit 2, 7.

Petitioner then filed a Personal Restraint Petition (PRP), together with a motion to supplement the record, and an amended petition. Dkt. # 7, Exhibit 9, 10, 11, 12. In a decision which was published in part, the Washington State Court of Appeals, Division I, denied and dismissed the PRP. *In re Sarausad*, 109 Wn. App. 824 (2001). Petitioner's subsequent motion for reconsideration was denied by the appeals court, and his motion for discretionary review was denied by the Washington Supreme Court. Dkt. #7, Exhibit 14, 15, 16, 17. Vigorously pressing petitioner's claim, counsel moved to modify the Commissioner's ruling, but this motion was also denied. Dkt. # 7, Exhibit 18, 20, 21. The petition for habeas corpus followed.

IV. GROUNDS FOR RELIEF

The petition presents four claims for relief, framed by counsel as follows:

> *Ground one*: The evidence was insufficient to support the convictions for murder and attempted murder, in violation of the due process clause. . . .
>
> *Ground two*: The State may argue that it had only to prove that Cesar knowingly assisted in the crime of reckless endangerment in the first degree in order to convict him of murder. If that is correct, then the accomplice liability statute fails to provide fair notice of the conduct prohibited and the penalties for specific conduct, in violation of the due process clause. . . .
>
> *Ground three*: The jury instructions, the prosecutor's closing argument, and the trial

> court's refusal to clear away the jury's expressed confusion, relieved the State of its burden to prove every element of the crimes beyond a reasonable doubt, in violation of the due process
>
> clause. . . .
>
> *Ground four*: The jury instructions allowed Cesar to be convicted of murder on less evidence than required to convict the principal, Ronquillo, against whom the State had to prove an intent to cause death, violating Cesar's right to equal protection of the law. . . .

Dkt. # 1, p. 6-10.

V. DISCUSSION

Respondent concedes that the claims designated as one, three and four have been duly exhausted as required under 28 U.S.C. § 2254(d), but asserts that claim two was not properly presented to the Washington Supreme Court on direct appeal, and thus is now foreclosed from review in this court by the rule of procedural bar. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). Petitioner has opposed this contention. However, it is not necessary to resolve this dispute, because the court has determined that petitioner is entitled to habeas relief on his claims designated as one and three.

A. Standard of Review

The proper analysis for petitioner's claims is set forth in 28 U.S.C. § 2254:

> (d) An application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ---

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d) and (e). The Supreme Court has noted that this statute imposes a "highly deferential standard for evaluating state court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997).

The Court has enunciated a two-part analysis for applying § 2254(d) to habeas claims:

> This basic premise informs our interpretation of both parts of § 2254(d)(1): first, the requirement that the determinations

> of state courts be tested only against "clearly established Federal law, as determined by the Supreme Court of the United States," and second, the prohibition on the issuance of the writ unless the state court's decision is "contrary to, or involved an unreasonable application of," that clearly established law.

Williams v. Taylor, 529 U.S. 362, 379 (2000). The Court noted that the "clearly established law" requirement limits the source of the applicable rule to holdings of the Supreme Court, and not dicta. *Id.* at 380.

Once the clearly established law has been determined, the appealscourt decision is reviewed to determine whether it is either contrary to, or an unreasonable application of, that law. A state court decision is "contrary to" clearly established law if it was based on the application of a rule that contradicts established legal principles, or arrives at a result different from that of the Supreme Court given a set of facts that is "materially indistinguishable" from those before the Court. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1174 (2003). Under the "unreasonable application" clause, this court may grant the writ if "the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The "unreasonable application" clause requires the state court's decision to be objectively unreasonable, not merely incorrect or erroneous. *Id., citing Williams v. Taylor*, 529 U.S. at 409.

B. Accomplice Liability

Petitioner was convicted under the Washington law on accomplice liability. The relevant statute provides that:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> . . .
>
> (c) He is an accomplice of such other person in the commission of the crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate in the commission of the crime he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it; or
>
> (b) His conduct is expressly declared by law to establish his complicity.

RCW 9A.08.020.

1. *Jury Instructions, Prosecutor's Comments and State Court Rulings*

The jury was instructed that in order to find defendant Sarausad guilty of the crime of murder in the second degree, each of four elements must be

proved beyond a reasonable doubt. In addition to finding that (a) the defendant or his accomplice discharged a firearm, (b) the victim died as a result of the acts of the defendant or his accomplice, and (c) the acts occurred in the State of Washington, the jury was instructed that it must find "that defendant, Cesar Frasco Sarausad, or an accomplice acted with intent to cause the death of another person." Instruction No. 17, Dkt. # 7, Exhibit 13, attachment 4. Some thirty instructions later, the following instructions were given to explain the meaning of intent and accomplice liability:

> No. 45: You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.
>
> No. 46: A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) Solicits, commands, encourages, or requests another person to commit the crime or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement,

support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

No. 47: A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

No. 48: A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Dkt. # 7, Exhibit 13, attachment 4.

In her closing argument, the prosecuting attorney explained the law of accomplice liability to the jury as follows:

Under the laws of the State of Washington, people who help commit crimes, people who assist in the commission of crimes are called accomplices or aiders and abettors,

as we more commonly know them to be. And in the eyes of the law, you are no less guilty because you drive the getaway car or because you solicit a crime to occur. You're no less guilty for helping than you are for pulling the trigger.

The defendants, Mr. Sarausad and Mr. Reyes, are classic accomplices. And let's talk a little bit about the law of accomplice liability as it exists in our state. You're going to have two instructions that talk about accomplice liability. . . . Instruction No. 45. . .essentially says that you are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another when he is an accomplice. And there's another instruction right behind it which breaks down all the ways somebody can assist or aid in the commission of a crime, solicit, command, encourage, request another person to commit a crime, aid or agreed to aid, presence at the time the crime is occurring or readiness to assist. . . .

The law of accomplice liability is such that the person who assists doesn't even have to have the same intentions as the actual person who is committing the crime. You have to be present, you have to be ready to assist. And you have to know that your assistance is causing the crime to unfold.

Let me give you a good example of accomplice liability. A friend comes up to you

and says, "Hold this person's arms while I hit him." You say, "Okay, I don't like that person, anyway." You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, "Well, I only intended this much damage to happen." Your presence, your readiness to assist caused the crime to occur and you are an accomplice. The law in the State of Washington says, if you're in for a dime, you're in for a dollar. If you're there or even if you're not there and you're helping in some fashion to bring about this crime, you are just as guilty.

In this particular case, the defendant, Mr. Reyes, brought these people together, and not once, but two trips to Ballard High School to regain the respect that he lost, his presence in the car, his readiness to assist. . . . But he essentially, ladies and gentlemen, was the instigator, the person who set the wheels in motion, the person who lost respect, the person who asked his fellow gang members to help him get it back.

The defendant, Mr. Sarausad, classic accomplice in this case. He's the driver, he's the wheelman. He allowed Mr. Ronquillo to fire those shots. And you recall, witness after witness described how the defendant, Mr. Sarausad, drove that car, ladies and gentlemen, fast at first. And, in fact, toward the end, even Mr. Cooke described the swooping motion, which is what each and every witness described in different way in

this case. The car slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up. Mr. Sarausad allowed this crime to occur by driving in the fashion he did alone.

Both these cases, ladies and gentlemen, the defendants, Mr. Sarausad and Mr. Reyes, they were both present and they were certainly ready to assist. And I remind you, too, what you heard not only from Detective Rusness, the gang expert in this case, but from 23rd member after 23rd member who told you that an affront to one is an affront to all. . . .

They were all there that day, especially these three, ready to back each other up in whatever happened. In for a dime, they were in for a dollar and they were sticking together. . . .

Dkt. # 24, Verbatim Report of Proceedings, October 21, 1994, p. 3011-3013. Then, in rebuttal, the prosecutor reiterated the "in for a dime, in for a dollar" theme:

I want to talk with you finally about the accomplice liability instruction. I think it just bears comment, and I promise I will sit down and this case will soon be yours to decide. The defendant, Mr. Sarausad's lawyer says that an accomplice has to have the same mental state as the person doing the shooting. Cesar Sarausad, Jerome Reyes also had to have premeditated intent. Not true, not true. And that's not what the instruction says.

> And I've told you the old adage, you're in for a dime, you're in for a dollar. If their logic was correct, they're not ever an accomplice to anything. The getaway driver for a bank robbery would say, "I just told him to rob them, I didn't tell him to shoot him, I didn't do anything." The example I gave you earlier, "I just told my friend to hold the arms down of this person while he hit him, I didn't tell him to kill him, I'm not guilty of anything." If you're in for a dime, you're in for a dollar.
>
> When they rode down to Ballard High School that last time, I say they knew what they were up to. They knew they were there to commit a crime, to disrespect the gang, to fight, to shoot, to get that respect back. A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar.

Id. at 3135.

During deliberations, the jury sent out four separate inquiries with regard to petitioner and accomplice liability. The inquiries, and the court's response to each, were as follows:

> October 25 Jury Inquiry: Request clarification on instructions No. 11 & No. ___ (illegible copy) Element (3); does the "intent" apply to (the defendant only) or to (the defendant or his accomplice)?

> Court's Response: Refer to instructions 46 and 47 and consider your instructions as a whole.

October 27 Jury Inquiry: Request to rehear the testimony of Cesar Frasco Sarausad II.

> Court's Response: Testimony will not be repeated.

October 28 Jury Inquiry: Reference: Instruction No. 17. In "the crime of murder in the second degree (intentional)". Question: Does intentional apply to only the defendant or only his accomplice?

> Court's response: Refer to instructions 45 & 46 and consider the instructions as a whole.

October 31 Jury Inquiry: We are having difficulty agreeing on the legal definition and concept of "accomplice". Question – when a person willing [ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?

> Court's Response: Reread instructions #s 45, 46, 47, and 48, and consider your instructions as a whole.

Dkt. # 7, Exhibit 12, attachment. The following day, November 1, the jury sent out a note saying they had reached a verdict with respect to Mr. Sarausad, but were unable to reach a verdict for Jerome Reyes. *Id.*

After petitioner was found guilty, counsel moved, unsuccessfully, for a new trial. He then filed a motion for reconsideration, and supported the motion with affidavits from two jurors, stating that

they were very confused by the jury instructions, and did not believe there was proof that Cesar Sarausad knew about the gun in his car, but interpreted the instructions as saying that "under no circumstances, could we find Cesar guilty of anything less than an intentional murder in the second degree." Dkt. # 7, Exhibit 11, Appendix G. The motion for reconsideration was denied.

On appeal, petitioner argued that the evidence was insufficient to support a conviction of second degree murder, and that the jury instructions on accomplice liability, explained by the prosecution as "in for a dime, in for a dollar" and not clarified by the trial court, relieved the State of its burden to prove every element of the crime of second degree murder beyond a reasonable doubt. Dkt. # 7, Exhibit 3. Citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), petitioner argued that

> [the] State must prove every ingredient of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. Under the "in for a dime/in for a dollar" rule, an accomplice is presumed guilty of a substantive offense on proof that someone else committed the offense and the accomplice knowingly did an act which facilitated that crime-without intending that it do so. The state is relieved of having to prove, as to the accomplice, all the *mens rea* element of the offense.

Dkt. # 7, Exhibit 3, p. 49.

The Washington State Court of Appeals, citing solely to Washington law, rejected petitioner's argument, but expressed some reservation in doing so.

> Sarausad misstates the law in Washington when he asserts that to be convicted as an accomplice, the State must prove that the accomplice had the mental state required for the commission of the charged offense. His argument that an accomplice is only liable for that substantive offense which he willfully sought to bring about has specifically been rejected in Washington.
>
> In order to convict an accomplice of intentional murder, the State need not show that the accomplice had the intent that the victim would be killed. RCW 9A.020(3)(a) has no such requirement.
>
> Accomplice liability in Washington is premised on the following principles: (1) To convict of accomplice liability, the State need not prove that principal and accomplice shared the same mental state, (2) accomplice liability predicates criminal liability on general knowledge of a crime, rather than specific knowledge of the elements of the principal's crime, and (3) an accomplice, having agreed to participate in a criminal activity, runs the risk that the primary actor will exceed the scope of the preplanned illegality.
>
> There is no requirement that the jury determine which participant acted as the principal, and which acted as the accomplice.

This court cannot reinterpret accomplice liability case law without overruling Supreme Court precedent. This court does not have the authority to overrule the Supreme Court.

. . . .

Although we uphold the constitutionality of the accomplice liability statute, we acknowledge the policy concerns underlying Sarausad's challenge to current judicial interpretation of the statute. Sarausad argues that the Washington Legislature did not intend to hold accomplices strictly liable for all crimes of the principal; that the State's "in for a dime, in for a dollar" violates legislative intent. When the Legislature enacted the complicity statute as part of a revision of the criminal code it did not adopt the following Model Penal Code (MPC) provision:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense. FN: MPC § 2.06(4).

The code revisers commented that this section would be excluded from the Washington statute "as redundant". According to Sarausad, this commentary proves that the drafters did not envision the overbroad use of

> the accomplice liability statute that has resulted.
>
> . . . .
>
> We recognize that Sarausad has raised issues that may be deserving of consideration by our Supreme Court. Current case law, however, states that an accomplice, "having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality. Although the theory of accomplice liability may have departed from legislative intent, we are bound by Supreme Court precedent. The Legislature could amend the statue to include a provision similar to MPC sec. 2.06(4) if case law has deviated from its original intent. The Legislature has not done so.

Dkt. # 7, Exhibit 2, p. 24-29. The court declined to consider the jurors' affidavits on the basis that "post-verdict statements regarding matters that inhere in the verdict cannot be used to attack that verdict." *Id.* at p. 30. Then, with respect to petitioner's claim that there was insufficient evidence to support the conviction, the appeals court stated:

> According to Sarausad the evidence establishes that he was merely present at the scene, and was therefore insufficient to support his conviction of murder in the second degree based on accomplice liability. Physical presence and awareness of the transaction alone are not sufficient to establish accomplice liability. An accomplice is criminally liable because of his intent to facilitate another in

the commission of a crime by providing assistance through his presence of his acts.

We view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt. Sarausad's argument is seriously undermined by the record.

The evidence establishes that Sarausad was a willing and active participant in the events of that day. It is undisputed that Sarausad drove the car from which the shots were fired. At some point before the fatal shot was fired, Ronquillo put a bandanna over his face and pulled out the gun. Viewed in the light most favorable to the State, the evidence was sufficient to support Sarausad's conviction.

Although it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day, there is circumstantial evidence to suggest that Sarausad had such knowledge. Some members of the Diablos knew that there was a gun accessible to gang members. Four witnesses testified to seeing a gun during the first trip to the school. A Diablo who rode in Sarausad's car during the second trip testified that there was mention of the possibility of a shooting. Sarausad admits that he knew of the possibility of a fight-he agreed to participate in a gang confrontation. Sarausad's actions do not fall within the range of activities that would preclude accomplice

> liability from attaching to his involvement in the shooting. We affirm Sarausad's conviction.

Id. at 31-32.

On September 29, 1998, the Washington Supreme Court denied review without comment. Dkt. # 7, Exhibit 7. Subsequently, however, the state supreme court decided a pair of cases which clarified the law of accomplice liability. In *State v. Cronin*, the court ruled that "in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged." *State v. Cronin*, 142 Wn. 2d 568, 579 (2000) (emphasis added). In this and the companion case of *State v. Roberts*, the court explored the *mens rea* requirement in the context of accomplice liability. Finding a fatal defect in an instruction that allowed the jury to find one person legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of a crime the court stated:

> Whether a criminal statute establishes strict liability for a crime may be determined by an examination of the statute's language and its legislative history. The language of the accomplice liability statute establishes a mens rea requirement of "knowledge" of "the crime." RCW 9A.08.020(3)(a). The statute's history, derived from the Model Penal Code, establishes that "the crime" means the charged offense. The comment to Model Penal Code § 2.06(3)(a), which is identical to RCW 9A.08.020(3)(a), requires the accomplice to

> "have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*" and states "*he will not be liable for conduct that does not fall within this purpose.*" Model Penal Code § 2.06 comment 6(b). The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has "knowledge", the mens rea of RCW 9A.08.020. In contrast, jury instruction 7 here essentially allowed the jury to impose strict liability on Roberts. The instruction, therefore, improperly departed from the language of the statute.

State v. Roberts, 142 Wn. 2d 471, 510 (2000) (emphasis in original) (footnotes omitted).

Following *Cronin* and *Roberts*, petitioner amended his pending Personal Restraint Petition (PRP) to re-assert the claims presented on appeal, set forth above, in light of the Washington Supreme Court's narrowed definition of accomplice liability. Dkt. # 7, Exhibit 12. Citing to *Cronin*, petitioner argued that in order to be deemed an accomplice, the individual must have acted with knowledge that he was facilitating the specific crime for which he was charged, and that jury instructions which allow conviction without finding that element are "legally insufficient." *Id.* at p. 6. The appeals court dismissed the petition, stating,

> In this personal restraint petition, Sarausad contends, *inter alia*, that although the accomplice liability instructions given at this trial complied with the requirements of *State v. Roberts*, an additional clarifying instruction

> should have been given, based on the State's "in for a dime, in for a dollar" argument to the jury and subsequent inquiries from the jury indicating confusion as to the mental state required for accomplice liability. Sarausad also contends that the evidence at trial was insufficient to support his conviction as an accomplice to actual and attempted murder. Although we examined these same issues in the direct appeal, Sarausad argues, and we agree, that we should reexamine the record in light of *Roberts*. But having done so, we conclude that the evidence was substantial that Sarausad knowingly facilitated the drive-by shooting. Moreover, contrary to Sarausad's contention here, the prosecutor did *not* ask the jury to convict Sarausad as an accomplice to murder, attempted murder and assault on any other basis than that he knowingly facilitated the drive-by shooting. This being so, the trial court did not abuse its discretion in responding to the jury inquiries as it did. Accordingly, we dismiss Sarausad's personal restraint petition.

Dkt. # 7, Exhibit 16, Appendix A, p. 1-2.

Petitioner moved for discretionary review by the Washington Supreme Court, arguing that the appeals court's decision applied a strict liability standard to the accomplice liability statue, in violation of the Constitution. Dkt. # 7, Exhibit 16, p. 9.

> It violates due process because the State is relieved from the constitutional requirement to prove against the accomplice every element

> of the offense. *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charged.") . . . The Court of Appeals' decision relieves the state of proving the most central element of criminal jurisprudence: the guilty mind, what the United States Supreme Court has described as "the single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Id.

The Washington Supreme Court denied review in a written decision, the relevant portions of which are set forth here:

> Mr. Srausad first argues that his murder and attempted murder convictions cannot stand because the jury was permitted to find him guilty as an accomplice to murder without finding that he knowingly aided in the commission of that crime. Mr. Sarausad is correct that accomplice liability may be premised only on knowing aid in the commission of the crime charged. *State v. Roberts*, 142 Wn. 2d 471, 510-13 (2000); *State v. Cronin*, 142 Wn. 2d 568, 579 (2000). For murder in particular, Mr. Sarausad must have had general knowledge that he was aiding in that crime. *Cronin*, 142 Wn. 2d at 581-82. But here the trial court correctly instructed the jury that it could convict Mr. Sarausad of

murder or attempted murder as an accomplice only if it found he knowingly aided in the commission [of] "the" crime charged.

Contrary to Mr. Sarausad's argument, it was not necessary that he share the principal's criminal intent, nor was it even necessary that he know each of the elements of the principal's crime. *Roberts*, 142 Wn. 2d at 513. It was essential, rather, that Mr. Sarausad have the purpose to facilitate the particular conduct that formed the basis for the charge. *Id.* at 510. General knowledge of the crime is therefore sufficient. *Id.* at 513. The Court of Appeals held that Mr. Sarausad could be found guilty based on his knowing aid in the commission of a drive-by shooting directed at a crowd of students in front of the school. On this point, the court neither obviously nor probably erred. It is true, as Mr. Sarausad notes, that drive-by shooting is itself a crime, committed when one recklessly discharges a firearm from a car in manner that creates a substantial risk of death or serious injury. RCW 9A.36.045(1). But it does not offend principles of accomplice liability to hold responsible one who knowingly aids such conduct when the "substantial risk of death" results in actual death.

Mr. Sarausad further contends, however, that the prosecutor erroneously argued an "in-for-a-dime-in-for-a-dollar" theory, improperly suggesting to the jury that he could be found guilty of murder if he knowingly aided only in some other crime. But as the Court of Appeals

> pointed out, whatever the flaws in the argument, the prosecutor properly focused on Mr. Sarausad's knowing participating in the shooting, not in some lesser altercation. The prosecutor never suggested Mr. Sarausad could be found guilty if he had no knowledge that a shooting was to occur. Rather, her proper point was that it was unnecessary for Mr. Sarausad to share Ronquillo's intent to kill. Mr. Sarausad fails to show the actual and substantial prejudice required for relief by personal restraint petition. *In re Lord*, 123 Wn. 2d 296, 303 (1994).

Dkt. # 7, Exhibit 17, p. 2-3.

2. *Due Process Analysis*

The ruling by the Washington Supreme Court was contrary to the clearly established law of *In re Winship*:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

387 U.S. 358, 364 (1970). The Washington Supreme Court, in *Roberts*, unequivocally stated that knowledge of the crime contemplated by the principal was an element of accomplice liability. "The language of the accomplice liability statute establishes a *mens rea* requirement of 'knowledge' of 'the crime.'" *State v. Roberts*, 142 Wn. 2d 471, 510 (2000), *citing* RCW 9A.080.020(3)(a). "The statute's

history, derived from the Model Penal Code, establishes that 'the crime' means the charged offense. . . . The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge', the mens rea of RCW 9A.08.020." *Id.* Yet the appealscourt allowed petitioner's conviction to stand without analyzing the requisite knowledge for that conviction under the *In re Winship* standards.

a. Accomplice Jury Instruction

The state appeals court dismissed the PRP on the basis the jury was correctly instructed in Instruction No. 46 that:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime or
>
> (2) aids or agrees to aid another person in planning or committing the crime.

Dkt. # 7, Exhibit 13, attachment 4 (emphasis added). In so ruling, the state court failed to consider petitioner's contention that the prosecutor's "in for a dime" argument, combined with the trial court's failure to address the confusion the jury expressed in its questions, effectively relieved the State of the burden of proving, beyond a reasonable doubt, petitioner's knowledge of the gun-a fact necessary to constitute the crime charged. The supreme court's

statement that "[t]he prosecutor never suggested Mr. Sarausad could be found guilty if he had no knowledge that a shooting was to occur" was unreasonable, because the prosecutor never specifically addressed, with respect to petitioner, the *mens rea* of knowledge, nor pointed to any specific evidence that proved, beyond a reasonable doubt, that Mr. Sarausad knew of the gun. Instead, by reiterating that "an affront to one was an affront to all", and that anyone "in for a dime" was "in for a dollar", the prosecutor impermissibly suggested that an act by any one member of the gang could be imputed to all, regardless of any one individual's actual knowledge. Dkt. # 24, p. 3011, 3013, 3014, 3130, 3135. For example, in addressing the repeated testimony of other 23rd Street gang members that the plan was only to return to Ballard High School for a fistfight, the prosecutor stated in her rebuttal argument,

> Yes, actions do speak louder than words, and their actions that day, ladies and gentlemen, belie the claim of immaculate murder, that nobody did anything, nobody knew anything, nobody wanted anything to happen. The fact of the matter is, ladies and gentlemen, a gun was fired not once, but several times in the direction of two people they thought were were BSP's. . . .
>
> Actions speak louder than words, and there is nothing, nothing whatsoever in the accomplice liability instructions that you have that says they have to sit down and plan and talk about it. It is sufficient, ladies and gentlemen, if you are present, if you are ready to assist. . . .

> And ladies and gentlemen, it is offensive to suggest for example that Cesar Sarausad has too much going for him to be held accountable for this crime. . . The fact of the matter is he was there not for one encounter, but all encounters that day. He did drive the car. For someone who's so smart and such a math major, you'd think he'd be able to add two and two. You'd think he knew what was going on.
>
> . . .
>
> It was understood, ladies and gentlemen, These aren't strangers to one another. They are 23rd Street Diablos. An affront to one is an affront to all. They knew why they were going down there. . . .

Dkt. # 24, pp. 3127-3130 (emphasis added). This line of argument, followed by the closing set forth above, that "When they rode down to Ballard High School that last time, I say they knew what they were up to", and two more repetitions of the "in for a dime" mantra, frankly invited the jury to apply a strict liability standard to accomplice libability: because petitioner was in for the "dime" of driving his car past Ballard High School a second time, he was automatically in for the "dollar" of the shooting, regardless whether he knew of the gun Mr. Roqnuillo had in his car. This argument thus relieved the State of the burden of proving every element of the crime beyond a reasonable doubt, in violation of the clearly established law of *In re Winship*.

Not surprisingly, this conclusion is supported by the jurors' inquiries, fully set forth above, and by the declarations filed by defense counsel and by two jurors after the trial. Particularly troublesome is the

foreperson's question issued late on the last day of deliberations, October 31:

> We are having difficulty agreeing on the legal definition and concept of "accomplice". Question – when a person willing[ly] participates in a group activity, is that person an accomplice to **any** crime committed by anyone in that group?

Dkt. # 7, Exhibit 12, attachment. The court's answer was that the jury should reread four designated instructions, and "consider your instructions as a whole." *Id.* At 10:40 the next morning, they announced they had reached a verdict as to petitioner, but were deadlocked at to co-defendant Jerome Reyes. *Id.*

Counsel moved for a new trial for petitioner on the basis of the jurors' confusion with respect to accomplice liability. Dkt. # 7, Exhibit 11. Counsel supported the motion with sworn declarations from two jurors, as well as his own. Specifically, the contents of a post-trial conversation with the jurors, in the presence of co-counsel, opposing counsel, and the trial judge are set forth:

> The jurors spoke generally of the deliberative process and of various concerns that they had. In response to questions posed by myself, jury foreman Drew Anderson (juror #7) and others indicated that the jury did not think that Mr. Sarausad had intended to kill anyone on the day in question. **He indicated that the jury did not consider and did not reach the question of what Mr. Sarausad knew of**

shooter Brian Ronquillo's state of mind prior to or at the time of the shooting.

The jurors indicated that they felt "very confused" about the concept of accomplice liability. One of the jurors, Jill Spadafora (juror #10), felt particularly moved by the state's argument "in for a dime, in for a dollar" in helping her to understand accomplice liability. At least one juror indicated that they became "very tired" of having to read and re-read instruction # 46 (the accomplice liability definition). **Particularly troublesome to this juror and to others was the dual reference within the same definition to "a crime" and "the crime."** Another juror indicated that they could not get past consideration of (or go lower than) murder in the second degree as to Mr. Sarausad because of the instructional language.

In a subsequent telephone conversation with Patricia Shiley (juror no. 6), she expressed frustration at being asked to assign a degree of responsibility to Mr. Sarausad. She indicated that the jury had very little "concrete to go on" and finally based Mr. Sarausad's conviction on the fact that a reasonable person would have realized something serious could happen under the circumstances and the fact that he was driving the car and had more control than others. According to Ms. Shiley, **the jury never reached any reasonable agreement on his degree of responsibility as an accomplice.** She indicated that the instructions were not clear, that the jury was

> confused over the instructions, but she and others felt, as to Mr. Sarausad, they lacked the option to go lower than one degree of responsibility below that of co-defendant Ronquillo.

Dkt. # 7, Exhibit 11, Appendix F.

Moreover, sworn declarations from two other jurors stated, in relevant part:

> Some of us did not believe that Cesar intended to do anything more than participate in a fight at Ballard High School. I and some of the other jurors believed that he never intended to see anyone killed or shot. **I did not believe that there was proof beyond a reasonable doubt that Cesar even knew of the presence of a gun in the car or that he had knowledge of Ronquillo's intent to shoot a gun that day or to kill anyone.**
>
> We jurors found the jury instructions very confusing, particularly as they applied to Cesar. We never understood, once we convicted Ronquillo as charged and made Cesar an accomplice, if we had the latitude to convict him of a lesser crime than intentional murder in the second degree. We tried several times to get clarification from the judge as to how the "intent" requirement applied to Cesar. The main response we got was to "re-read instruction # 46", the accomplice definition. We did re-read that instruction, along with others, but we remained confused, even after the verdict was announced in open court.

> When we could not get clarification from the court we interpreted the instructions as saying that, under no circumstances, could we find Cesar guilty of anything less than an intentional murder in the second degree. This greatly troubled me because, factually, I felt Cesar was probably guilty of something, but certainly not murder or attempted murder.
>
> I understand now that Cesar could have been an accomplice to a manslaughter and not have been an accomplice to intentional murder. But I did not believe that was possible during the deliberations, nor did the rest of the jury. If I had known that during deliberations, I would never have agreed to go along with the rest of the jurors in returning guilty verdicts on intentional murder, the attempted intentional murders, and intentional assault. I would have held out for no more than a manslaughter conviction, because I believe that charge more accurately describes Cesar's crime and his responsibility.
>
> **I believe that the jury confusion during the deliberations has resulted in Cesar being convicted of crimes that he did not commit. I feel this a grave injustice.**

Dkt. # 7, Exhibit 11, Appendix G (emphasis added).

The state courts declined to consider these affidavits, relying on the doctrine that "post-verdict statements regarding matters that inhere in the verdict cannot be used to attack that verdict." Dkt. # 7, Exhibit 2, p. 30. However, this Court is not bound by the state court rule, and may consider the

affidavits because they demonstrate that in the minds of the jurors, the State was relieved of the burden of proving every element of the crime beyond a reasonable doubt.

b. Evidence of prior knowledge of the crime

In order to convict petitioner as an accomplice, the jurors had to find that he knowingly aided in the commission of the crime of murder and attempted murder. Even acknowledging the state courts' assessment that only "general knowledge" of the crime is sufficient, it cannot be said that petitioner knowingly aided in the crime that was committed – murder by drive-by shooting – if he did not know that someone in the group had a gun in his possession. Several jurors specifically stated that they did not find knowledge of a gun. This court's review of the trial transcripts produces no evidence from which a reasonable juror could find, beyond a reasonable doubt, that petitioner knew that anyone in his car was armed with a gun.

i. The first confrontation: the presence of a gun

The state courts pointed to evidence that four witnesses claimed to see a gun on the Diablo's first trip to Ballard High School, thus raising the inference that petitioner knew that someone among them had a gun, at that point in time. However, even if the jurors were to believe the highly inconsistent testimony regarding a gun at the first confrontation, there was no evidence whatsoever that ties it to whether the petitioner saw or knew of the alleged gun. The participants in the first

confrontation were unanimous in testifying that the Diablos arrived in two cars, a red one driven by petitioner, and a black one driven by another Diablo. Testimony was also consistent that petitioner stayed in or near his car and did not participate in the shouting and shoving match. But testimony as to the gun was very inconsistent. Soo Saecho, a Ballard student, stated that someone who came from the black car lifted up his shirt and displayed a gun to him. Tr. (Transcript of Proceedings, Dkt. # 13) 2425. Arsalan Alavi testified that someone, not associated with either car, stepped out of the crowd and held a gun on him for two minutes. Tr. 1547, 1562. In his earlier report to the police, however, he identified the person with the gun as having come from the black car. Tr. 1568. No one else saw this gun that was supposedly held on him for two minutes. Ryan Lam testified that someone pulled out a gun and showed it to Tong Ly, but Tong Ly denied seeing any gun. Tr. 1663-4, 2414. Only one witness, Diane Klemz, who lived in the neighborhood, testified to seeing "somebody pulling something back in" to the red car. "And at that point, I turned to my girlfriend and I said, "I think I saw a gun.'" Tr. 1741. She was, however, not certain because she just saw a "glint" and it did not look like any gun she had seen before. *Id.*

Moreover, Ms. Klemz' testimony was inconsistent with all the others' in many ways. Despite the fact that everyone else testified that there were two cars, a red one and a black one following closely behind, she saw only one car, the red one. She was certain that if there had been another with it she would have noticed. Tr. 1747. She placed the time as after 12:30 pm, after the

Ballard High School lunch period, but the first drive-by alteration actually occurred during that lunch period, which ends at 12:30. Tr. 1260, 1734. She testified that after it passed by her house, police stopped the red car, and then at least twenty minutes later after hearing shots, she called 911. Tr. 1742-3, 1745. None of this story -- witnesses of two cars which drove by Ballard High School during the lunch period, with passengers leaning out, yelling and shaking fists -- was consistent with that told by all the other Tr. 1205-07, 1260, 1526-32, 1865, 2403-13. The cars sped off when a police car appeared, and neither was stopped by the police.

There was no evidence linking petitioner with a gun on the first trip to Ballard High School, apart from Ms. Klemz' very inconsistent testimony regarding a possible gun in a red car, which may or may not have been petitioner's car. Even if the jury accepted Soo Saecho's or Arsalan Alavi's testimony regarding seeing a gun during the shoving match, everyone agreed that petitioner stayed in or near his car during the brief altercation, and he did not participate. Therefore, there was no proof that he saw or knew of any gun. Tr. 1529; 2422-24; 1662.

Even if there were a gun displayed on that first trip, the evidence is unequivocal that it was not the gun used in the later shooting. Testimony by various witnesses established that Brian Ronquillo obtained the murder weapon from another Diablos member, Michael "Lolo" Vicencio, shortly before the second trip to Ballard. Lolo had the gun hidden in his car and brought it to the home of Guarev Nayar, where the Diablos spent some time between the two trips to Ballard. It was actually petitioner who

guided Lolo, in a separate car, to Guarev's house, but there was no evidence of any mention of a gun between the two. Tr. 2075. After the two cars arrived at Guarev's house, Brian Ronquillo went outside to Lolo's car to get the gun. Several Diablos testified that petitioner was in the house at that time and not present when the gun was transferred. Tr. 2028-29, 2250, 2263, 2278, 2664. Some of the other Diablo members knew about the gun because Lolo had shown it off at a party at Guarev's house two weeks before, but they uniformly agreed that petitioner was not at that party. Tr. 2290, 2326, 2367, 2702, 2753. This was consistent with petitioner's own testimony that he was seeing fellow gang members much less frequently at that time because he was then a student at the University of Washington.[2] Tr. 2767. Lolo himself testified that petitioner had never seen the gun. Tr. 2080, 2125-26.

ii. Circumstantial evidence of prior knowledge of a shooting

The appeals court's conclusion that the cited evidence amounted to circumstantial evidence from which the jury could infer that petitioner knew of the gun was based on an unreasonable determination of the facts, in light of the testimony. 28 U.S.C. § 2254(d)(2). Circumstantial evidence is proof of a chain of facts from which a juror could find that another fact exists, even though it has not been proved directly. Ninth Circuit model Jury Instruction (Criminal) 3.8.

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[2] The day of the shooting was during petitioner's spring break. Tr. 2768.

From this court's review of the record there was no evidence that petitioner knew about a gun in the Diablo's possession, despite the state appeals court conclusion that there was circumstantial evidence:

> Sarausad contests the sufficiency of the evidence to convict him as an accomplice in light of *Roberts*; that is, he contends that there was insufficient evidence that he knowingly facilitated the drive-by shooting as opposed to just a minor physical confrontation. We disagree. Gosho and Marckx testified that "capping" was discussed on the return trip to the school. At some point before the shooting, Ronquillo tied a bandana over the lower part of his face and pulled the gun out of his pants. While parked side by side with the other carload of Diablos, Sarausad said, "Are you ready?" Sarausad then drove the car in such a manner as to facilitate a drive-by shooting, not in such a manner as to stop, park the vehicle and engage in fisticuffs. An expert in gangs testified about the kind of gang mentality that requires the gang to avenge its honor when one of its members is disrespected by a rival gang, and that causes the gang members to see violence [a]s an acceptable means of regaining lost respect. This evidence, although circumstantial in nature, when viewed in the light most favorable to the State is sufficient to allow a rational jury reasonably to infer that Sarausad knowingly facilitated the drive-by shooting.

In re Sarausad, 109 Wn. App. 824, 844-45 (2001)

The Court of Appeals offers four examples of circumstantial evidence: a) a statement made in the petitioner's car about "capping;" b) Ronquillo's use of the bandana as a partial disguise; c) the petitioner's question to the members of the other car, "are you ready" and d) the petitioner's manner of driving to facilitate a shooting and not fisticuffs. Here is the record.

(a) The discussion of shooting or "capping."

Lucas Gosho, one of the Diablos who was present on both trips to Ballard High School, testified pursuant to an agreement that allowed him to plead guilty to a lesser charge of rendering criminal assistance, with a one year jail term. Tr. 1435. On direct examination, he stated that after the Diablos left Guarev's house in two cars, there was a discussion about returning to Ballard High School.

> Q. Was there a discussion about your options, what you would do?
>
> A.. Yes. There were several options. I mean, we weren't even sure if they were going to be there or not. We were just stopping by. And if they were, then, you know, we didn't really have any plan. We were just-you know, we might just look at them or fight them or yell at them or fight them or possibly shoot them.
>
> Q. You said possibly shoot them. Was that an option that was discussed with everybody in the house?
>
> A. Yes.

Q. Did you think there was a possibility based on the discussion?

A. I didn't really think it was going to happen, no.

Tr. 1425. There was no testimony as to when this discussion occurred or whether Gosho was in petitioner's car at the time. He previously testified that he started out in Lolo's car, but then switched places with "Rocky" and moved to petitioner's car. Tr. 1423-24. Without more, there was no evidence from which the jury could find that petitioner was a part of this discussion, or even heard it. On re-direct the prosecutor tried to explore further:

Q: You were asked questions about the plan that day. What was your understanding of the range of options with respect to shooting?

A. I knew that it was one of the options, but I didn't seriously think it was going to be because there were, you know, there was other options.

Q: With respect to shooting being an option, do you recall what was said about that as an option?

A. I can't recall who said what. But, you know, somebody must've brought it up, that we could shoot as an option.

Q: I'm sorry, what?

A. I can't recall one person saying that. But, you know, it was brought up as an option, so yeah.

Q: What was said specifically with respect to shooting being an option?

A. Well just that, you know, it was a possibility that we could, you know.

Q: Was there anything mentioned with respect to a gun and shooting?

A. I don't recall exactly. But, you know, there must have been a gun if we were going to shoot.

Tr. 1509. The prosecutor then attempted to clarify this vague testimony by using the witness' statement to the police:

Q: Mr. Gosho, we were talking about what you have in your hand, State's Exhibit No. 25, page 40 of that 43-page statement you gave. Do you recall at the point in the interview when Detective Maning was asking you about the discussion regarding the possibilities with respect to shooting?

A: Yes, I do.

Q: Do you recall Detective Maning saying to you, "Okay. So somebody, well, we've got a gun, we can shoot them"? What was your response?

A: It was, "Right."

Q: You said, "Right"?

A: Yeah.

Q: And Detective Maning responded by saying, "I mean, I don't know. Is that what was said?" What was your response then?

A: I said, "Well, I don't recall specifically."

Q: Detective Maning then asked you, "But somebody said, 'We've got a gun.'" And what was your response?

A: I said, "Yeah."

Tr. 1516-17. Again, there was nothing in this testimony, that could constitute even circumstantial evidence of petitioner's knowledge of the gun; the statements were too vague and not linked to petitioner by either time or place. Counsel for petitioner elicited clarification of that point:

Q: You didn't see a gun prior to the shooting?

A: Right.

Q: And you're saying that there was no plan by this group to shoot anybody that day?

A: Right.

Q: And that Cesar Sarausad wasn't part of any plan to shoot anybody that day?

A: Right.

Tr. 1499.

The "capping" to which the appeals court referred was mentioned only by Michael Marckx. He was also a Diablo member who was present during the events of the day, and who rode in petitioner's car on the second trip to Ballard High School. Like Lucas Gosho, he testified pursuant to an agreement with the prosecutor for a reduced charged of criminal assistance. Tr. 2189-90. He testified as follows on direct examination:

Q: Let me take you back briefly to the shooting itself when you guys were parked on 14th Avenue Northwest where you were headed down to the school. Was there any discussion about capping or shooting?

A: I heard someone say, "Are we going to cap?"

Q: What does the term "cap" mean?

A: Shoot.

Q: "That was in your car?

A: Yeah.

Tr. 2167. On cross-examination, Mr. Marckx explained that the "capping" question came from someone in the back seat of petitioner's car, where he sat as well. He heard the question immediately before the shooting started, so close in time that there was no time for anyone to respond to the question, and no time for anyone to do anything to stop the shooting. Tr. 2186, 2205, 2222-24. Before that time, he testified, there was no plan to shoot anyone, or to pull a gun, as far as he knew. Tr. 2186. The plan was at most, to fight with fists, but Mr. Marckx thought even that was just tough talk and nothing would really happen. Tr. 2184-85. Moreover, he described petitioner as listening to loud rap music on the radio and as not enthusiastic about fighting, nor excited as he drove back to Ballard. Tr. 2219.

Petitioner, testifying in his own defense, stated that he did not hear anything at all in the car about "capping", shooting, firing, or possessing a gun. Tr. 2912-13. He also testified that he did not

understand the term "capping", so that even if he did hear it, he would not have known what it meant. Tr. 2913. Even if the jurors were to discount this testimony as self-serving, there was nothing in Mr. Marckx' testimony from which a reasonable juror could infer that petitioner knew of the gun in his car, directly nor circumstantially. At best, if he heard the reference to capping (over the music), the only evidence is that it was uttered no more than a second or so before the shooting started – too late to stop it.

(b) The bandana and the question "Are you ready?"

Unpersuasively the appeals court cites Ronquillo's wearing a bandana just before shooting and Petitioner's questions to the driver of the second car as circumstantial evidence of petitioner's knowledge. The record shows that neither petitioner nor Mr. Marckx saw Brian Ronquillo pull the bandana up over his lower face before the shooting began; they only noticed it after hearing the shots. Thus the jury would have to speculate regarding Ronquillo's wearing a bandana as signifying a specific meaning, rather than merely a form of gang identification. The law requires proof of a fact from which the jurors could find that petitioner knew, in advance, what Mr. Ronquillo had planned, or what it meant when he pulled up the bandana. Gang clothing is too general a characterization and does not warrant the appeals court's conclusion concerning the petitioner's knowledge.

Moreover, speculation is also present when the appeals court infers a premeditated shooting from the petitioner's question, "Are you ready?", posed to the Diablos as the two cars sat side-by-side before

the final turn toward Ballard High School. First, only one witness testified to hearing the entire question "Are you ready?" Michael "Lolo" Vicencio, who was driving the other car on the second trip to Ballard High School, refers to the moment when the two cars pulled up side-by-side within sight of Ballard High School as follows:

> Q: Once you arrived at Ballard High School, where did Mr. Sarausad park his car or stop his car, I should say? Why don't you get up there and show the jury.
>
> A: Here (indicating).
>
> Q: Where did you park in relationship to this car?
>
> A: This side of him.
>
> Q: Was anything said? Did he say anything to you all once the cars were stopped?
>
> A: Like, "Are you ready?"
>
> Q: "Are you ready?"
>
> A: Yeah.

Tr. 2033. To this point, this same witness, Lolo, testified that the Diablos had only discussed returning to Ballard High School for the purpose of fighting – as his understanding of what was to occur, and the context in which he reported Mr. Sarausad's question. Tr. 2025, 2032, 2086. One other witness, Jerome Reyes, agreed with the prosecutor that petitioner asked "Ready?" Tr. 2713.

The petitioner made a different remark according to Michael Marckx. He testified as follows on direct examination:

Q: Once you got to Ballard, what happened in the area of Ballard?

A: We pulled over, and he told the second car behind us that we were going to fight.

Q: Who told the second car?

A: I believe it was Cesar.

Q: Do you remember what he said to them?

A: He just said, "We're going to see if they want to fight now."

Q: Was he asking them or was he telling them?

A: He was telling them.

Tr. 2156. Mr. Marckx never mentioned the "Are you ready?" question. Nor did Lev Arakelyan, who testified that what petitioner said was, "Follow us." Tr. 1922. This was petitioner's testimony also. Tr. 2797.

Nevertheless, the appeals court seized on the "Are you ready?" question as circumstantial evidence of petitioner's knowledge that a shooting was about to occur. Their characterization of the testimony is not reasonable, in light of the questions's ambiguity. While there had been a first confrontation and it is reasonable that things might escalate with a second confrontation, it is impermissively speculative that a "shooting" was imminent. The structure of petitioner's question is open-ended, it not as conclusive as the appeals court reasoned.

(c) Petitioner's driving.

Further, the appeals court states, "Sarausad then drove the car in such a manner as to facilitate a drive-by shooting, not in such a manner as to stop, park the vehicle and engage in fisticuffs." *In re Sarausad*, 109 Wn. App. at 845. This is an incorrect characterization of the complete testimony. Only one witness, retired military officer James J. Cook, described the path of petitioner's car in this matter. Mr. Cook was driving eastward on NW 67th Street when he saw petitioner's car coming down 14th Avenue NW. Tr. 2510. He described a kind of "swooping" motion as the car turned left from 14th Avenue NW to draw parallel with the school on NW 67th Street. Tr. 2511. He testified that the red car slowed so suddenly that he had to brake to avoid a collision. Tr. 2512. Then he heard "pops" and saw "expended brass." *Id.* The car sped off as the firing continued. Tr. 2520. Mr. Cooke stated that he did not at any time see another car, and would have noticed had there been one. Tr. 2522, 2526. This, despite the testimony of every other witness that the brown car driven by "Lolo" was directly behind petitioners – or immediately in front, as testified by one witness, Ryan Lam. Tr. 1673.

Apart from this sole witness, multiple witnesses described the path of petitioner's car in a manner that was equally consistent with stopping to get out. Ryan Lam stated the car slowed for the turn, but sped up after shots were fired. Tr. 1673. Tam Nguyen, who was with Ryan on the sidewalk, stated that the car came fast down 14th Avenue, "and they suddenly stopped in front of the parking lost right there on the driveway. And they started

shooting. . ." Tr. 1872-73. Jerome Reyes, in petitioner's car, stated that the car slowed "ready to stop." Tr. 2714-15. Furthermore, Lolo, driving the other car, stated that the cars did stop, and everyone was ready to get out. Tr. 2035, 2058. In fact, one Diablo in Lolo's car opened the door and was about to step out, but then the shots were fired. Tr. 2038.

The prosecutor argued that Mr. Cooke's testimony about the "swooping" motion of petitioner's car was proof of his complicity in the shooting; he slowed to facilitate it and then sped off. Tr. 3012. However, these facts are susceptible to another equally consistent view. The petitioner's testimony that he slowed on the turn and was about to stop so everyone could exit the car for a confrontation, but panicked, and sped away immediately when Mr. Ronquillo started firing, is very plausible. Tr. 2158, 2714-15. Seeing it from this perspective, Mr. Cooke's testimony arguably corroborates the petitioner-the car pulled away with the shooter still firing backwards; it did not wait while the shooting was completed. Tr. 2520. Thus, when viewed in its entirety, the testimony about the petitioner's driving did not constitute proof of any fact from which the jurors could find, beyond a reasonable doubt, the fact that he knew a drive-by shooting was planned.

c. *In re Winship* Analysis

Accordingly, as shown here, it was unreasonable for the appealscourts to conclude that there was sufficient evidence from which a rational juror could find proof, beyond a reasonable doubt, that petitioner knew of the gun. There was neither direct nor circumstantial evidence that petitioner had actual knowledge of the gun; but rather, any

conclusion by the jury that he did have prior knowledge would necessarily have been based on impermissible speculation. Indeed, two jurors declared, under penalty of perjury, that they, specifically, did not find that petitioner's knowledge of a gun had been proven; they voted to convict because they felt they had no other choice under the confused instructions they were given. Another juror's statement emphasizes that their confusion was only compounded by the prosecutor's explanation that the law in the State of Washington is "in for a dime, in for a dollar". Dkt. # 7, Exhibit 11, Appendix F, G. In light of these statements, together with this court's review of the evidence, it cannot be said that the State proved every element of the crime beyond a reasonable doubt.

The state appeals court did not analyze petitioner's burden of proof claim under the constitutional standard set forth in *In re Winship*, although a violation of that standard was argued by petitioner in his PRP. The appealscourt's inquiry ended with the finding that the jury instructions comported with appealslaw. It is true that jury instruction No. 46, with its reference to "the crime" was not itself erroneous as a matter of state law. That determination by the state court is only amenable to habeas review if the petitioner demonstrates that the error in instructing the jury violated some right guaranteed to defendants by the Fourteenth Amendment. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Such review is limited to considering whether the defective instruction "so infected the entire trial that the resulting conviction violates due process." *Carriger v. Lewis*, 971 F.2d 329, 334 (9th

Cir.1992), *cert. denied*, 507 U.S. 992 (1993) (*quoting Cupp v. Naughton*, 414 U.S. at 147). Here, the instruction was one part of a combination of circumstances-the others being the unanswered jury questions, and the prosecutor's "in for a dime" litany-which resulted in a conviction without proof, beyond a reasonable doubt, of every element of the crime, in violation of petitioner's due process right.

In the opinion denying discretionary review of the appeals court's order, the Washington Supreme Court ruled that, under Washington law, petitioner could only be held liable as an accomplice to the crime of murder if he had general knowledge of that crime. Though set forth above, the relevant portion is repeated for clarity:

> Mr. Sarausad is correct that accomplice liability may be premised only on knowing aid in the commission of **the** crime charged. For murder in particular, Mr. Sarausad must have had general knowledge that he was aiding in **that** crime. But here the trial court correctly instructed the jury that it could convict Mr. Sarausad of murder or attempted as an accomplice only if it found he knowingly aided in commission of "the" crime charged.
>
> Contrary to Mr. Sarausad's argument, it was not necessary that he share the principal's criminal intent, nor was it even necessary that he know each of the elements of the principal's crime. It was essential, rather, that Mr. Sarausad have the purpose to facilitate the particular conduct that formed the basis for the charge. General knowledge of the crime is therefore sufficient. The Court of Appeals

> held that Mr. Sarausad could be found guilty based on his knowing aid in the commission of a drive-by shooting directed at a crowd of students in front of the school. On this point, the court neither obviously nor probably erred. It is true, as Mr. Sarausad notes, that drive-by shooting directed at a crowd of students in front of the school. On this point, the court neither obviously nor probably erred. It is true, as Mr. Sarausad notes, that drive-by shooting is itself a crime, committed when one recklessly discharges a firearm from a car in a manner that creates a substantial risk of death or serious injury. RCW 9A.36.045(1). But it does not offend principles of accomplice liability to hold responsible one who knowingly aids such conduct when the "substantial risk of death" results in actual death.

In re Sarausad, Dkt. # 7, Exhibit 17, p. 2 (emphasis added) (citations to *State v. Roberts* and *State v. Cronin* omitted). It is clear from the jurors' inquiries, and their post-trial statements, that the distinction between "a crime", "the crime" and "that crime" was not understood, but the appeals court simply rested its determination on the finding that the instruction was correct under state law.

As to the definition of accomplice liability, this determination by the state supreme court is not subject to review by this court. The views of the highest state court are binding with respect to state law. *Wainwright v. Goode*, 464 U.S. 78 (1983). However, in order to uphold petitioner's conviction, the state court necessarily had to conclude that the jurors found the requisite knowledge that he was

aiding in the commission of the crime beyond a reasonable doubt. *State v. Cronin*, 142 Wn. 2d at 579. Regardless whether "the" crime is defined as drive-by shooting or premediated murder, the requisite knowledge necessarily included knowledge that someone among the Diablos had a gun on the second trip to Ballard. As explained above, the court's presumption that the jurors so found was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This determination, in turn, led to a ruling that was contrary to the clearly established law of *In re Winship* that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

VI. CONCLUSION

The decision of the Washington Supreme Court in petitioner's Personal Restraint Petition was contrary to the clearly established law of *In re Winship*. The petitioner is therefore entitled to relief under 28 U.S.C. § 2254(d). The petition for habeas corpus should be granted, vacating his convictions of second degree murder and second degree attempted murder. As petitioner has fully served his sentence on the remaining assault charge, he should be released from custody unless the State of Washington elects to re-try him, and that trial commences within 90 days after the entry of the Order adopting this Report and Recommendation.

Proposed forms of Order and Judgment reflecting this recommendation are attached.

DATED this 13th day of October, 2004.

/s/ Monica J. Benton

MONICA J. BENTON

United States Magistrate Judge

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint	)	
Petition of	)	**ORDER**
CESASAR SARAUSAD, II,	)	No. 72160-2
Petitioner.	)	C/A No. 45550-8-I
	)	

Department I of the Court (composed of Chief Justice Alexander and Justices Smith, Madsen, Ireland and Chambers) (Justice Bridge sat for Justice Ireland) considered this matter at its ~~September 4~~ October 8, 2002, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 8th Day of October, 2002.

/s/ Gerry L. Alexander

CHIEF JUSTICE

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of CESAR FRASCO SARAUSAD II, Petitioner.	No. 72160-2 RULING DENYING REVIEW

Cesar Sarausad seeks discretionary review of a Court of Appeals decision denying his personal restraint petition. RAP 16.14(c); RAP 13.5.

While Mr. Sarausad drove by Ballard High School and slowed down, one of his passengers, Brian Ronquillo, fired several shots toward students, intending to kill two members of a rival gang. The shots missed their intended targets, but one struck Brent Mason in the leg and another stuck Melissa Fernandes in the head, resulting in her death. Mr. Sarausad was tried together with Ronquillo and another defendant, and he was ultimately found guilty of second-degree intentional murder, two counts of attempted second-degree murder, and second-degree assault while armed with a firearm. The Court of Appeals affirmed Mr. Sarausad's convictions on direct appeal and denied his subsequent personal restraint petition in a partially published decision. *State v. Sarausad*, 109 Wn. App. 824, 39 P.3d 308 (2001).

Mr. Sarausad first argues that his murder and attempted murder convictions cannot stand because the jury was permitted to find him guilty as an accomplice to murder without finding that he knowingly aided in the commission of that crime.

Mr. Sarausad is correct that accomplice liability may be premised only on knowing aid in the commission of the crime charged. *State v. Roberts*, 142 Wn.2d 471, 510-13, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). For murder in particular, Mr. Sarausad must have had general knowledge that he was aiding in that crime. *Cronin*, 142 Wn.2d at 581-82. But here the trial court correctly instructed the jury that it could convict Mr. Sarausad of murder or attempted murder as an accomplice only if it found he knowingly aided in the commission "the" crime charged.

Contrary to Mr. Sarausad's argument, it was not necessary that he share the principal's criminal intent, nor was it even necessary that he know each of the elements of the principal's crime. *Roberts*, 142 Wn.2d at 513. It was essential, rather, that Mr. Sarausad have the purpose to facilitate the particular conduct that formed the basis for the charge. *Id.* at 510. General knowledge of the crime is therefore sufficient. *Id.* at 513. The Court of Appeals held that Mr. Sarausad could be found guilty based on his knowing aid in the commission of a drive-by shooting directed at a crowd of students in front of the school. On this point, the court neither obviously nor probably erred. It is true, as Mr. Sarausad notes, that drive-by shooting is itself a crime, committed when one recklessly discharges a firearm from a car in a manner that creates a substantial risk of death or serious injury. RCW 9A.36.045(1). But it does not offend principles of accomplice liability to hold responsible one who knowingly aids such conduct when the "substantial risk of death" results in actual death.

Mr. Sarausad further contends, however, that the prosecutor erroneously argued an "in-for-a-dime-in-for-a-dollar" theory, improperly suggesting to the jury that he could be found guilty of murder if he knowingly aided only in some other crime. But as the Court of Appeals pointed out, whatever the flaws in the argument, the prosecutor properly focused on Mr. Sarausad's knowing participation in the shooting, not in some lesser altercation. The prosecutor never suggested Mr. Sarausad could be found guilty if he had no knowledge that a shooting was to occur. Rather, her proper point was that it was unnecessary for Mr. Sarausad to share Ronquillo's intent to kill. Mr. Sarausd fails to show the actual and substantial prejudice required for relief by personal restraint petition. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

Mr. Sarausad next argues that convicting him of both attempted murder and premeditated murder based on the same shooting incident violates double jeopardy principles. Premeditated first-degree murder is committed when, "[w]ith a premeditated intent to cause the death of another person, [the perpetrator] causes the death of such person or of a third person." RCW 9A.32.030(1)(a). In this case, therefore, the fact that Ronquillo did not intend to kill Melissa Fernandes did not preclude Mr. Sarausad from being charged with murdering her, since the shot Ronquillo fired was intended to kill someone else. But Mr. Sarausad contends that, under these circumstances, he cannot be convicted of both attempted murder (of the intended victim) and first-degree murder (of the actual victim). Mr. Sarausad's argument on this point is elaborate but unconvincing. The Court of Appeals thoroughly

analyzed the issue in its lengthy opinion, and Mr. Sarausad does not show that the court erred. If for no other reason, the argument fails because it is based on the faulty premise that Mr. Sarausad was charged with and convicted of both offenses based on a single shot, once for the hit and once for the miss. Ronquillo fired multiple shots at a crowd of people and thus committed multiple offenses. Mr. Sarausad was thus an accomplice to multiple offenses.

In a related argument, Mr. Sarausad contends that the trial court erred in imposing consecutive sentences under RCW 9.9A.400(1)(b). That statute requires the imposition of consecutive sentences for multiple "serious violent offenses arising from separate and distinct criminal conduct." Mr. Sarausad recognizes that there were multiple victims in this case, and thus the crimes generally do not satisfy the definition of "same criminal conduct." *See* RCW 9.94A.400(1)(a). But he contends that where "transferred intent" is involved, the crimes should not be treated separately. But there is nothing in the statute which admits of an exception for transferred intent. And again, Mr. Sarausad ignores the fact that Ronquillo fired multiple shots. The Legislature could not reasonably have intended to treat a shooting spree directed at a crowd of people as a single criminal act. *See State v. Wilson*, 125 Wn.2d 212, 220, 883 P.2d 320 (1994) (rejecting transferred intent argument and holding that four assault convictions resulting from firing multiple shots into tavern constituted separate and distinct criminal acts mandating consecutive sentences).

In sum, the Court of Appeals did not obviously or probably err in denying Mr. Sarausad's personal

restraint petition, nor are there any other grounds for review under RAP 13.5. Accordingly, the motion for discretionary review is denied.

/s/ Geoffrey Crooks

COMMISSIONER

July 10, 2002

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PERSONAL RESTRAINT	)
PETITION OF	) NO. 45550-8-I
CESAR FRASCO	) DIVISION ONE
SARAUSAD II,	)
Petitioner,	)
v.	)
STATE OF WASHINGTON	) OPINION
Respondent.	) PUBLISHED IN
	) PART
	) FILED NOV 26 2001

Kennedy, J. - Following a drive-by shooting, Cesar Sarausad II was convicted of second degree (intentional) murder, two counts of attempted murder in the second degree, and assault in the second degree while armed with a firearm. We affirmed his conviction on direct appeal in an unpublished opinion.[1] In this personal restraint petition, Sarausad contends, *inter alia*, that although the accomplice liability instructions given at his trial complied with the requirements of *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), an additional clarifying instruction should have been given, based on the State's "in for a dime, in for a dollar" argument to the jury and subsequent inquiries from the jury indicating confusion as to the mental state

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[1] *State v. Ronquillo*, Nos. 35804-5-I and 35875-I (consolidated), March 2, 1998, *review denied*, 136 Wn.2d 1018 (1998).

required for accomplice liability. Sarausad also contends that the evidence at trial was insufficient to support his conviction as an accomplice to actual and attempted murder. Although we examined these same issues in the direct appeal, Sarausad argues, and we agree, that we should reexamine the record in light of *Roberts*. But having done so, we conclude that the evidence was substantial that Sarausad knowingly facilitated the drive-by shooting. Moreover, contrary to Sarausad's contention here, the prosecutor did not ask the jury to convict Sarausad as an accomplice to murder, attempted murder and assault on any other basis than that he knowingly facilitated the drive-by shooting. This being so, the trial court did not abuse its discretion in responding to the jury inquiries as it did. Accordingly, we dismiss Sarausad's personal restraint petition.[2]

FACTS

Cesar Sarausad II, Brian Ronquillo, and Jerome Reyes were charged with and tried together for first degree (premeditated) murder of Melissa Fernandes, attempted first degree murders of Ryan Lam and Tam Nguyen, and second degree assault of Brent Mason, all in the course of a drive-by shooting at Ballard High School on March 23, 1994.[3] Brian

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[2] Sarausad's remaining contentions, which we also conclude are without merit, are treated in the unpublished portion of this opinion.

[3] The three were also charged, in the alternative, with second degree felony murder of Melissa Fernandes. The jury was instructed not to consider that count as to any defendant whom they convicted of first degree murder or the lesser-included offense of second degree intentional murder. The jury

Ronquillo, the shooter, was found guilty of one count of first degree (premeditated) murder, two counts of attempted first degree murder and one count of second degree assault while armed with a firearm. Cesar Sarausad, who drove the car to and from the shooting, was found guilty of the lesser-included offenses of one count of second degree (intentional) murder, two counts of attempted second degree murder, and second degree assault while armed with a firearm. The jury was unable to reach a verdict as to Jerome Reyes, and a mistrial was declared as to him.

Sarausad, Ronquillo and Reyes were associated with a gang called the "23rd Street Diablos" (Diablos). Reyes told members of the Diablos that, two days before the shooting, he had been chased from the vicinity of Ballard High School by members of a rival gang, the "Bad Side Posse" (BSP). Nine members of the Diablos went in two cars to Ballard High School to confront the BSP. Sarausad drove one of the cars.

The Diablos arrived at the school and confronted some members of the BSP. A shoving match ensued during which gang signs were flashed and harsh words were exchanged. The Diablos left after someone indicated that police were nearby.

The Diablos went to a member's house where they listened to music, ate and initiated a new

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did not reach the felony murder count as to any defendant. We note in passing that Sarausad's judgment and sentence indicates that he was convicted under the statute number for second degree felony murder, but this was clearly a scrivener's error, in that the remainder of the record shows conclusively that he was convicted of second degree intentional murder.

member into the gang. Ronquillo obtained a handgun from a fellow Diablo and put it into his pants. The Diablos returned to Ballard High School, again riding in two cars. Sarausad drove again, and his car was in the lead. Ronquillo was in the front passenger seat with Sarausad. Three other Diablos were in the back seat of Sarausad's vehicle: Jerome Reyes, Luke Gosho and Michael Marckx. Marckx and Gosho both testified that "capping" (shooting) was mentioned during the trip back to the school. Upon approaching the school, the two carloads pulled side by side and there was a brief discussion. Sarausad said, "Are you ready?"

Ryan Lam, Tam Nguyen and Melissa Fernandes were standing outside the school when the two cars approached. Sarausad drove his car past the students, slowing momentarily as Ronquillo, wearing a bandana tied over his nose and mouth, pointed a handgun out the open car window and pulled the trigger at least six and as many as ten times. According to a State's expert witness, the bullets were fired directly at the students. Lam and Nguyen ducked to the ground and were unscathed. Fernandes died the next day from a penetrating wound on the left side of her head. Brent Mason, another student in the vicinity, was hit in the leg by a bullet fragment.

Sarausad, still in the lead, sped away and the other vehicle followed. Some distance from the school, both cars stopped and Ronquillo transferred the gun to the other car. Sarausad drove the Diablos that were in his car to Northgate Mall, dropped them off, and then drove home. The next day, after a discussion with Ronquillo, a fellow Diablo threw the

chopped-up handgun into a lake, and it was never recovered.

The State's theory at trial, bolstered by testimony of an expert witness, was that gang mentality required the Diablos to regain respect after one of their own, Reyes, was chased out of BSP territory. The first trip to Ballard High School, ending abruptly as it did by reason of proximity of police, did not sufficiently serve that purpose, and so the gang went back to the school, this time to carry out a drive-by shooting-a certain means of regaining respect. The State entered into plea bargains with several of the gang members, agreeing to reduce the charges against them in exchange for their truthful testimony at the trial of Ronquillo, Sarausad and Reyes, who, the State argued, were the primary instigators of the drive-by shooting.

The defense theories at trial were as follows: Ronquillo admittedly was the shooter but he neither premeditated nor intended to kill and was, therefore, only guilty of manslaughter. Sarausad and Reyes returned to the school expecting, at most, another shoving match or fist fight, had no idea whatsoever that Ronquillo had armed himself for the return trip and were totally and utterly dismayed when Ronquillo started shooting. Nothing was pre-planned, there was no discussion of shooting anybody, nobody in Sarausad's car knew Ronquillo was armed and none of them saw Ronquillo tie on the bandana. Finally, the defense team argued that the gang members who testified for the State were bald-faced liars trying to save their own skins.

Such additional facts as may be necessary to clarify our opinion will be set forth below.

DISCUSSION

To obtain relief in this personal restraint petition, Sarausad must show that he was actually and substantially prejudiced either by a violation of his constitutional rights or by a fundamental error of law. *In re Benn*, 134 Wn.2d 868, 884-85, 952 P.2d 116 (1998). Sarausad contends that the case was tried on a mistaken view of accomplice liability, one that allowed the State to argue to the jury that Sarausad was an accomplice to murder even if he only meant to facilitate another shoving match and exchange of gang signs-the "in for a dime, in for a dollar" theory of accomplice liability. Thus, Sarausad argues, the State was relieved of its obligation to prove the mental state required of an accomplice, an error of constitutional proportions. And he was prejudiced, Sarausad contends, because the evidence was insufficient to prove that he knew that he was facilitating "the crime" of murder as opposed to "a (any) crime" such as a misdemeanor-level assault. Even though the accomplice liability instructions here mirrored the statute and thus did not suffer from the fatal flaw in *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), the jury sent out inquiries three separate times during deliberation requesting clarification of the mental state required of an accomplice, only to be told each time to re-read the same instructions already given. Because Sarausad asked for a supplemental instruction and his request was denied, he argues that the trial court abused its discretion-particularly in light of the State's closing arguments to the jury, which Sarausad contends misstated the law of accomplice liability as now defined in *Roberts*.

Although Sarausad raised these same issues in the direct appeal, he points out, and correctly so, that this court decided that appeal on the premise that "in for a dime, in for a dollar" correctly characterized Washington accomplice liability law. We said that "an accomplice, 'having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality.'" Slip Opinion (direct appeal) at 28-29 (quoting *State v. Davis*, 101 Wn.2d 654, 658, 682 P.2d 883 (1984)) (citing *State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974)). We also said that "sufficient evidence was presented to support Sarausad's conviction under a correct interpretation of the accomplice liability statute" and that although there was circumstantial evidence suggesting that Sarausad had such knowledge, "it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day [.]" Slip Opinion (direct appeal) at 3; 32. We agree with Sarausad that, in all fairness, we should take another look at these issues in light of *Roberts*.

ACCOMPLICE LIABILITY CLARIFIED

After our disposition of Sarausad's direct appeal, our Supreme Court in *State v. Roberts* clarified accomplice liability law by holding that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate "the crime" for which he or she is eventually charged, and that knowledge of "'a crime' does not impose strict liability for any and all offenses that follow." 142 Wn.2d at 513; *see also State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Thus, an

accomplice liability jury instruction that allowed liability to attach if the jury found that the person was an accomplice in the commission of "a crime" as opposed to "the crime" was erroneous because it departed from Washington's accomplice liability statute.[4] *Roberts*, 142 Wn.2d at 513.

The *Roberts* court explained that the language in *Davis*, 101 Wn.2d at 658, stating that an accomplice, having agreed to participate in a crime, runs the risk that the principal actor will exceed the scope of the pre-planned illegality, was not intended to impose strict liability on putative accomplices for any and all crimes but rather was intended to reaffirm the longstanding rule that an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime. *Roberts*, 142 Wn.2d at 511-12. The Legislature intended that an accomplice "have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*" and the accomplice "*will not be liable for conduct that does not fall within this purpose.*" *Id.* at 510-11 (quoting from the comment to Model Penal Code § 2.06(3)(a) which is identical to RCW 9A.08.020(3)(a)).

"The crime" means the charged crime, but because only general knowledge is required, even if the charged crime is aggravated, premeditated first

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[4] The relevant portion of RCW 9A.08.020 states: "A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. . . . A person is legally accountable for the conduct of another person when . . . [h]e is an accomplice of such other person in the commission of *the crime*." (Italics ours).

degree murder as it was in *Roberts*, "the crime" for purposes of accomplice liability is murder, regardless of degree. This is made clear in *Cronin*, 142 Wn.2d at 581-82, wherein the court said that the State had to prove beyond a reasonable doubt that Cronin, who was charged with premeditated first degree murder, had knowledge that he was aiding in the commission of the crime of murder. And in *State v. Bui*, consolidated with *Cronin*, the charge was assault in the first degree and it was charged additionally that "firearms and deadly weapons" were used in committing the crime. 142 Wn.2d at 571-72.[5] The court said that in order to show that Bui was an accomplice to these charged crimes the State had to prove beyond a reasonable doubt that he possessed general knowledge that the crime he was facilitating was assault. *Id.* at 580.

The jury in that case inquired whether Bui had to know whether he was aiding first degree assault or a crime of any kind and the trial court responded that Bui needed to know "'the general nature of the crime that will occur[.]'" Although this is correct in the abstract, the Supreme Court was concerned that the jury might not have understood from this supplemental instruction that the State had to prove that Bui was aware he was facilitating a physical confrontation between the two gangs, as opposed to merely a verbal confrontation. Thus the

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[5] In *Bui*, two cars loaded with members of a gang met up with two cars loaded with members of a rival gang. After gang signs were flashed, two of the men in the car that Bui was driving got out of his car carrying firearms and riddled the cars of the rival gang with bullets, wounding two of them but killing none of them. 142 Wn.2d at 570-72.

supplemental instruction did not cure the instructional error. *Id.* at 581.

From this, we conclude that the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder. Likewise, an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor-level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.

Because the *Roberts* court specifically adhered to its ruling in *Davis*, we also conclude that the statement in *Davis* that an accomplice takes the risk that the principal may exceed the scope of the pre-planned crime still has meaning, having to do with the degree of the crime. In *Davis*, the defendant-accomplice and the principal planned a strong-arm robbery but the accomplice did not know the principal was armed. As now clarified, the *Davis* court said that it did not matter that the accomplice was unaware that the principal was armed because the accomplice took the risk that the principal would exceed the scope, that is, escalate the degree of the pre-planned robbery. 101 Wn.2d at 658.

SARAUSAD'S CONTENTIONS

Applying this clarification to Sarausad's

petition, the obvious question is this: Presuming that the State presented substantial evidence from which the jury could find beyond a reasonable doubt that Sarausad knowingly facilitated a drive-by shooting, is that a sufficient basis to find him guilty as an accomplice to murder for the death of Fernandes, the attempted murders of Lam and Nguyen and the assault of Brent Mason? We conclude that it is. As the *Roberts* court observed, our Legislature intended to impose accomplice liability upon those having "the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*" and not to impose such liability "for conduct that does not fall within this purpose." 142 Wn.2d at 510-11. The particular conduct that formed the basis for the charged crimes here was the drive-by shooting. The State had to prove that Sarausad knowingly facilitated the drive-by shooting; it did not have to prove that Sarausad knew that Ronquillo had formed the premeditated intent to kill rival gang members. In order to promote a drive-by shooting, a putative accomplice necessarily must know that the principal was armed. Thus, when we concluded in the direct appeal that "it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gun play that day" we erred. Under *Roberts*, that is exactly what the State had to prove.

This reasoning comports with the statutory definition of "knowledge," which is the mens rea required of an accomplice. RCW 9A.08.020(3)(a); *Roberts*, 142 Wn.2d at 510. RCW 9A.08.010(1)(b) defines "knowledge" in the following terms: A person acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result

described by a statute defining an offense; or he or she has information that would lead an ordinary person in the same situation to believe that facts exist that are described by a statute as defining an offense.[6] A rational trier of fact reasonably could base accomplice liability for a murder, an assault, or both, on its determination that an ordinary person would know that a drive-by shooting is likely to result in the death or injury of one or more people-and thereby infer that a given defendant who knowingly facilitated a drive-by shooting thereby knowingly facilitated the murder, attempted murders and assaults that resulted from the drive-by shooting.[7]

With all of this in mind, we now turn our attention to Sarausad's contentions for this personal restraint petition. As we have noted, the accomplice liability instructions at Sarausad's trial complied with *Roberts* and the Washington accomplice liability

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[6] The knowledge statute must be interpreted as only permitting rather than directing the jury to find that the defendant had actual knowledge if it finds that the ordinary person would have had knowledge under the circumstances. The jury must still be allowed to conclude that the defendant was less attentive or intelligent than the ordinary person and, therefore, lacked actual, subjective knowledge. *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980).

[7] It seems clear from the record that Sarausad's counsel understood this premise, for he tried vigorously to persuade the jury that Sarausad, who performed well in school and who clearly had great potential for success in life, would not have been so stupid as to have returned to Ballard High School if he had known Ronquillo was armed and contemplating a shooting.

statute.[8] Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and when read as a whole properly inform the jury of the applicable law. *State v. McLoyd*, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997), *aff'd sub nom. State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999). Under that standard, the accomplice liability instructions here at issue are sufficient.

Nevertheless, at Sarausad's trial the jury inquired three separate times during deliberations, indicating confusion with respect to the mens rea required for accomplice liability. On the first occasion, the jury asked whether the element of "intent" in several of the to-convict instructions

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[8] Instruction 45 states: "You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime." And Instruction 46 states in pertinent part:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either
>
> (1) solicits, commands, encourages, or requests another person to commit the crime or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

applied only to the defendant or to both the defendant and his accomplice. On another day, the jury asked essentially the same question with respect to the to-convict instruction for second degree murder. And finally the jury sent out this inquiry: "We are having difficulty agreeing on the legal definition and concept of 'accomplice.' Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?" On each of these occasions, the court replied by instructing the jury to re-read various instructions, including the accomplice liability instructions, together with the instructions as a whole. The court denied Sarausad's request for a response to the third inquiry that would either simply answer "no" or that would tell the jury that in order to be an accomplice one must "(1) promote or facilitate the crime being considered by the actor, (2) the actor must have the mental state required for the crime, and (3) the accomplice must know that the actor had the required mental state."[9]

Sarausad vigorously argues that under the unique facts of this case, the trial court's failure to provide a supplemental instruction in response to the jury's persistent inquiries relieved the State of its burden to prove its case beyond a reasonable doubt-notwithstanding that the accomplice liability instructions complied with the requirements of *Roberts*-because of the way that the prosecutor argued the case to the jury. He contends that

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[9] Sarausad admits that this proposed supplemental instruction overstates the mens rea required of an accomplice as defined in *Roberts*. Supplemental Reply Brief in Support of Personal Restraint Petition at 7, n.4.

because his trial took place before *Roberts* was handed down, the prosecutor erroneously assumed, and argued, that the jury could find Sarausad guilty as an accomplice to murder if he had the purpose to facilitate an offense of any kind whatsoever, even a shoving match or fist fight.

But this is not an accurate description of the prosecutor's actual argument. During closing, the prosecutor said:

> Under the laws of the State of Washington, people who help commit crimes, people who set the wheels in motion, people who assist in the commission of crimes are called accomplices or aiders and abettors, as we more commonly know them to be. And in the eyes of the law, you are no less guilty because you drive the getaway car or because you solicit a crime to occur. You're no less guilty for helping than you are for pulling the trigger.
>
> The defendants, Mr. Sarausad and Mr. Reyes, are classic accomplices. And let's talk a little bit about the law of accomplice liability as it exists in this state. . . . [Instruction 45] essentially says that you are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another when he is an accomplice. And there's another instruction right behind it [Instruction 46] which breaks down all the ways somebody can assist or aid in the commission of a crime, solicit, command, encourage, request another person to commit a crime, aid or [agree] to aid,

presence at the time the crime is occurring or readiness to assist.

In fact, accomplice liability is such that a person can be an accomplice to a crime whether they're present or not when the crime occurs. I'll give you a good example. The defendant, Mr. Reyes, by setting the wheels in motion, by simply calling his friends, getting them together, saying, "Let's go avenge this problem," he's an accomplice. You call somebody up on the phone and you tell them to go do something, "Go commit this crime and report back to me," and the person does it, you are an accomplice. If you wait outside the bank while somebody's robbing it and all you're doing is driving, you are an accomplice.

The law of accomplice liability is such that the person who assists doesn't even have to have the same intentions as the actual person who is committing the crime. You have to be present, you have to be ready to assist. And you have to know that your assistance is causing the crime to unfold.

Let me give you a good example of accomplice liability. A friend comes up to you and says, "Hold this person's arms while I hit him." You say, "Okay, I don't like that person anyway." You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, "Well, I only intended this much damage to happen." Your presence, your readiness to assist, caused the crime to occur and you are an accomplice. The law in the State of

Washington says, if you're in for a dime, you're in for a dollar. If you're there or even if you're not there and you're helping in some fashion to bring about this crime, you are just as guilty.

. . . .

The defendant, Mr. Sarausad, classic accomplice in this case. He's the driver, he's the wheelman. He allowed Mr. Ronquillo to fire those shots. And you recall, witness after witness after witness described how the defendant, Mr. Sarausad, drove that car, ladies and gentlemen, fast at first. And, in fact, toward the end, even Mr. Cooke described the swooping motion, which is what each and every witness described in different ways in this case. The car slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up. Mr. Sarausad allowed this crime to occur by driving in the fashion he did alone.

Report of Proceedings at 3009-13.

And then in rebuttal argument:

I want to talk to you finally about the accomplice liability instruction. I think it just bears comment, and I promise I will sit down and this case will soon be yours to decide. The defendant, Mr. Sarausad's lawyer says that an accomplice has to have the same mental state as the person doing the shooting. Cesar Sarausad, Jerome Reyes also had to have premeditated intent. Not true, not true. And

that's not what the instruction says.

And I've told you the old adage, you're in for a dime, you're in for a dollar. If their logic was correct, they're not ever an accomplice to anything. The getaway driver for a bank robbery would say, "I just told him to rob them, I didn't tell him to shoot him, I didn't do anything." The example I gave you earlier, "I just told my friend to hold the arms down of this person while he hit him, I didn't tell him to kill him, I'm not guilty of anything." If you're in for a dime, you're in for a dollar.

When they rode down to Ballard High School that last time, I say they knew what they were up to. They knew they were there to commit a crime, to disrespect the gang, to fight, to shoot, to get that respect back. A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar.

The defendant, Mr. Ronquillo did not act alone. He acted with the assistance of the driver, Mr. Sarausad[.]

Report of Proceedings at 3134-35.

Sarausad argued for the direct appeal that an accomplice must share the same mental state as the principal. In the course of rejecting that proposition, we said that accomplice liability "in Washington has been reduced to the maxim, 'in for a dime, in for a dollar.'" Slip Opinion (direct appeal) at 3. Given the nature of Sarausad's contentions for the direct

appeal, it was not necessary for us to closely examine what the prosecutor actually said during closing arguments. Having done so now, we observe that the prosecutor did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a fist fight, he nevertheless was guilty of murder. As can be seen from the above excerpts, the prosecutor assigned a different meaning to the phrase "in for a dime, in for a dollar," using that phrase to signify the gang mentality that led to this crime-the mentality that an affront to one Diablo is an affront to all that must be avenged to restore respect to the gang no matter the means. The prosecutor effectively argued that Sarausad and the other Diablos were "in for a dime" on the first trip to Ballard High School where the pushing and shoving took place, and when that proved insufficient to restore the gang's lost respect, Sarausad and the other Diablos were "in for a dollar" on the second trip to Ballard High School for the purpose of shooting.

We also observe that the prosecutor's robbery hypothetical probably would pass muster under the now-clarified ruling in *Davis*, for it is based on essentially the same facts: "I only told him to rob him I didn't tell him to shoot him" seems virtually indistinguishable from "I only planned to participate in a strong-arm robbery, I didn't know my cohort was armed"-so long as the person shot during the robbery does not die from the wound-as he seemingly did not in the prosecutor's hypothetical. If the person does die, the *Roberts* court said that felony-murder would be the appropriate charge. 142 Wn.2d at 511 n.14 (citing RCW 9A.32.030(1)(c); *State v. Osborne*, 102

Wn.2d 87, 93, 684 P.2d 683 (1984)). The "hold his arms while I hit him" hypothetical may or may not be problematic under *Roberts*. On the one hand, the hypothetical accomplice in this illustration certainly "facilitate[d] *the particular conduct that form[ed] the basis for the charge*[.]" *Roberts*, 142 Wn.2d at 510-11. On the other hand, in *Roberts* and *Cronin* our high court was concerned that the jury may have based accomplice liability for murder on the purported accomplice's purpose to facilitate a robbery, not a homicide, so that in this hypothetical, the putative accomplice might better have been charged with felony murder.

But to resolve this personal restraint petition, we need not decide the prosecutor's hypothetical cases but rather the case at hand. Viewing the prosecutor's accomplice liability arguments as a whole, we conclude that even if one or both of the prosecutor's hypothetical illustrations were to fail the *Roberts* "a crime-the crime" test for knowing facilitation outside the felony-murder context, Sarausad was not prejudiced. This is because the court properly instructed the jury as to the law of accomplice liability and because the prosecutor made it crystal clear to the jury that the State wanted Sarausad found guilty of first degree murder, first degree attempted murder and second degree assault[10] because he knowingly facilitated the drive-by shooting and for no other reason. Not once did the prosecutor suggest to the jury that it could or

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[10] The prosecutor went for broke as it were, never mentioning during closing or rebuttal arguments the lesser included offenses to the murder and attempted murder charges or the alternative charge of felony murder.

should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight-the very means of regaining respect that had failed during the first trip to the school.

Thus, whatever the basis for the jury's confusion may have been, the accomplice liability instructions were sufficient, and nothing that the prosecutor argued to the jury required a remedial or supplemental instruction from the trial court.[11] Thus, we adhere to our ruling in the direct appeal that the trial court properly exercised its discretion in denying Sarausad's request for clarifying instructions.

SUFFICIENCY OF THE EVIDENCE

Sarausad contests the sufficiency of the evidence to convict him as an accomplice in light of *Roberts*; that is, he contends that there was insufficient evidence that he knowingly facilitated the drive-by shooting as opposed to just a minor physical confrontation. We disagree. Gosho and Marckx testified that "capping" was discussed on the return trip to the school. At some point before the shooting, Ronquillo tied a bandana over the lower

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[11] We note that during Sarausad's closing, his counsel argued that in order to convict Sarausad of premeditated murder as an accomplice, the State had to prove beyond a reasonable doubt that Sarausad knew Ronquillo had premeditated intent to murder someone, and that the same was true as each of the lesser-included charges. Report of Proceedings at 3073. The prosecutor responded during rebuttal that an accomplice does not have to have the same intent as the shooter. Report of Proceedings at 3134.

part of his face and pulled the gun out of his pants.[12] While parked side by side with the other carload of Diablos, Sarausad said, "Are you ready?" Sarausad then drove the car in such a manner as to facilitate a drive-by shooting, not in such a manner as to stop, park the vehicle and engage in fisticuffs. An expert in gangs testified about the kind of gang mentality that requires the gang to avenge its honor when one of its members is disrespected by a rival gang, and that causes the gang members to see violence is an acceptable means of regaining lost respect. This evidence, although circumstantial in nature, when viewed in the light most favorable to the State is sufficient to allow a rational jury reasonably to infer that Sarausad knowingly facilitated the drive-by shooting. Sarausad argues that the substantial evidence standard[13] does not apply because of the trial court's failure to respond to the jury inquiries with something more than telling them to reread the instructions already given. But we have determined, both on direct appeal and for this personal restraint

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[12] Even one of the defense attorneys argued during closing that it begged reason that five teen-agers in a car wouldn't know that one of their number was carrying a handgun, and that none of them would have noticed when Ronquillo tied the bandana over the lower part of his face and head and pulled out the handgun. Report of Proceedings at 3116-17. Defense counsel raised this point to show that Gosho and Marckx had to be lying. The jury was free to draw its own inferences.

[13] We view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt. *State v. Galisia*, 63 Wn. App. 833, 839, 822 P.2d 303 (1992).

petition, that the trial court did not err in this regard.

CONCLUSION

Sarausad has failed to meet the heavy burden required of a personal restraint petitioner to show actual and substantial prejudice from a violation of his constitutional rights or from a fundamental error of law. Accordingly, we dismiss the petition.

The remainder of this opinion lacks precedential value and will not be published in the Washington Appellate Reports, but will be filed of public record in accord with RCW 2.06.040.

Sarausad argues that (1) the State violated RCW 9A.72.090, the bribery statute, by offering to make lenient recommendations to his cohorts in exchange for their truthful testimony;[14] (2) his protection against double jeopardy was violated when he was charged and convicted for one count of actual murder and two counts of attempted murder, involving different victims; and (3) the trial court erred in concluding that he was required to serve consecutive sentences for the murder and attempted murder convictions under the "serious violent" exception in RCW 9.94A.400(1)(b). We will examine each of these contentions in turn.

BRIBERY STATUTE

Sarausad argues that the State violated RCW 9A.72.090, the bribery statute, because the State agreed to reduce charges and recommend leniency as

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[14] Sarausad also raises a subsidiary argument regarding the court's failure to grant a requested cautionary jury instruction on accomplice testimony.

to several of Sarausad's cohorts in exchange for their truthful testimony at his trial. Sarausad further argues that his trial counsel was ineffective for failing to object to the admission of such testimony.

RCW 9A.72.090(1)(a) states:

> A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . with intent to . . . [i]nfluence the testimony of that person[.]

Sarausad relies on *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) to support his argument. There, a three-judge panel of the court held that 18 U.S.C. § 201(c)(2), the federal anti-gratuity statute,[15] applied to prohibit federal prosecutors from offering leniency to witnesses in exchange for their testimony. As Sarausad acknowledges, the case was subsequently overruled *en banc* by *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (*Singleton II*), *cert. denied*, 527 U.S. 1024 (1999). In *Singleton II*, the Tenth Circuit interpreted § 201(c)(2) to hold that the statute did not apply to the United States government in its

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[15] 18 U.S.C. § 201(c)(2) states in relevant part: "whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . before any court . . . shall be fined under this title or imprisoned for not more than two years, or both."

prosecutorial capacity. *Singleton II* reasoned that the use of the word "whoever" in the statute could not apply to the United States government, an inanimate entity. 165 F.3d at 1300. Further, the court reasoned that "applying the statute to the government would deprive the sovereign of a recognized or established prerogative, title, or interest[,]" because the "ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government." *Id.* at 1301. The court further concluded that "in light of the longstanding practice of leniency for testimony, we must presume if Congress had intended that section 201(c)(2) overturn this ingrained aspect of American legal culture, it would have done so in clear, unmistakable, and unarguable language." *Id.* at 1302.

As did the *Singleton II* court, we reject the notion that the Legislature intended RCW 9A.72.090 to apply to the State's long-established practice of offering leniency to accomplices for truthful testimony. The Legislature certainly is aware that such plea bargains are often the only means of convicting principals. Moreover, to be guilty of a violation under 9A.72.090(1)(a), one must intend to "influence" the testimony of a person upon whom a benefit is conferred. "Influence" means "to affect or alter the conduct, thought or character of by indirect or intangible means; . . . to have an effect on the condition or development of: determine partially: modify." Webster's (3rd) International Dictionary 1160 (1969). "Bribe" refers to "a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct[.]" *Id.* at 275.

Thus, in the context of the bribery statute, to intend to influence a witness's testimony connotes an intention to alter the truthful nature of that testimony or to thwart the ends of justice. The State commits no violation under the statute when it offers a witness leniency in exchange for truthful testimony.

Sarausad nevertheless argues that "influence" cannot be read so narrowly and must be read to include a prosecutor's intent to induce truthful testimony where a witness would otherwise be disinclined-absent the incentive of leniency-to truthfully testify. Both the legislative history of RCW 9A.72.090, and the statutory scheme in which this section is found, belie Sarausad's interpretation. In enacting the statute, the Legislature intended to confront the evil of obstruction of justice:

> The legislature finds that witness intimidation and witness tampering *serve to thwart . . . the effective prosecution of criminal conduct in the state of Washington*[,] . . . [and] therefore, that tampering with and/or intimidating witnesses or other persons with information relevant to a present or future criminal or child dependency proceeding are grave offenses which *adversely impact the state's ability to promote public safety and prosecute criminal behavior.*

1994 c 271 § 201 (italics ours).

Similarly, it is informative that RCW 9A.72.090 is located in Chapter 9A.72, entitled "Perjury and Interference with Official Proceedings." Among other offenses, this chapter criminalizes

perjury,[16] false swearing,[17] intimidating a witness[18] and tampering with a witness.[19] Clearly, this chapter is intended to address crimes involving dishonesty and the obstruction of justice. It is a logical absurdity to say that RCW 9A.72.090 criminalizes the State's offer of leniency to a witness in exchange for truthful testimony.

Sarausad's trial and appellate counsel thus cannot be faulted for failing to object to witness testimony provided in exchange for leniency. Moreover, trial counsel argued vigorously that the accomplices' testimony was unworthy of belief because it was bought and paid for by the State by way of the plea bargains.

DENIAL OF REQUEST FOR CAUTIONARY INSTRUCTION

Although he admits that failure to give a cautionary instruction with respect to testimony of an accomplice might not ordinarily warrant collateral relief, Sarausad argues that the failure to grant his requested cautionary instruction warrants relief here because the accomplice-witnesses were bribed.[20] We have already rejected the premise that

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[16] RCW 9A.72.020 & .030

[17] RCW 9A.72.040

[18] RCW 9A.72.110

[19] RCW 9A.72.120

[20] "The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering

the State violated the bribery statute by plea-bargaining with the accomplices. Moreover, a cautionary instruction is required only if the accomplice testimony is uncorroborated. *State v. Gross*, 31 Wn.2d 202, 196 P.2d 297 (1948). "[W]hile the corroborating evidence must be independent of the testimony of the accomplice, it is sufficient if it fairly tends to connect the accused with the commission of the crime charged; and it is not necessary that the accomplice be corroborated in every part of his testimony." *Id.* at 216-17.

Lev Arakelyan was charged with reckless endangerment in the second degree in exchange for his promise to testify truthfully; Luke Gosho, Michael Vincencio and Michael Marckx were each charged with reckless endangerment in the first degree in exchange for their promises. As these individuals' testimonies implicated Sarausad in the drive-by shooting, under *Gross* we must determine whether there is independent corroborating evidence that connects him to the crimes charged. A single example will suffice: Arakelyan testified that he thought Sarausad was driving the red car in the first trip to Ballard. The red car was identified by another witness as Sarausad's vehicle, and Sarausad himself testified that he was driving the red car during the two trips to Ballard High School. Numerous independent witnesses testified that during the second trip to Ballard High School, the red car slowed down briefly as shots were fired from the vehicle, and then sped away. This independent testimony is adequate corroboration of Sarausad's

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the testimony, you are satisfied beyond a reasonable doubt of its truth." Clerk's Papers at 25.

participation in the drive-by shooting. Sarausad was not convicted on the basis of the accomplices' testimony alone. No cautionary instruction was required.

DOUBLE JEOPARDY

Sarausad argues at great length and with apparent sincerity that his constitutional protection against double jeopardy was violated when the State charged and he was convicted of one count of second degree intentional murder (Fernandes) and two counts of attempted murder in the second degree (Lam and Nguyen). The State's theory was that Ronquillo, the shooter, fired the handgun with premeditated intent to kill Lam and Nguyen but accidentally killed Fernandes instead. The jury was instructed on the doctrine of transferred intent and the prosecutor explained during closing argument that the doctrine is based on the premise that a person should not be rewarded for being a bad shot. Sarausad now contends that the Legislature did not intend to punish a person more harshly for being a bad shot; thus, under the murder statute the State must elect whether to charge the actual murder or the attempted murder-in that charging both violates the double jeopardy rule. He argues further that applying the doctrine of transferred intent brings this case within the same rules that would apply if the State tried to convict a defendant both of attempted murder and actual murder of the same victim, by means of a single gunshot.

Sarausad first points to the premeditated murder statute which provides that "[a] person is guilty of murder in the first degree when: (a) With premeditated intent to cause the death of another

person, he or she causes the death of such person *or of a third person*[.]" RCW 9A.32.030(1)(a) (italics Sarausad's). He reasons that because the first degree murder statute clearly contemplates the accidental situation where one victim is targeted but another is hit, and because the Legislature did not include in the murder statute authorization to charge twice-once for the miss and once for the hit-the State must elect whether to charge based on the attempt or the completed act. This, he contends, is because the murder statute says a person is guilty of murder when with the requisite intent he kills the person he meant to kill "*or*" a third person, and if the Legislature had meant to allow prosecutions for both the hit and the miss, it would not have used the disjunctive "or."

Sarausad reaches this conclusion via a "single shot" theory, that is, a single shot that was aimed at one person but missed and hit a third person. For authority, he points to *Ladner v. United States*, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958). There, a defendant who fired a single discharge from a shotgun at two federal officers was charged with, convicted of and sentenced consecutively for two counts of assault with a deadly weapon-one count for each of the federal officers. The high court reversed on collateral review, not on grounds of double jeopardy, but because Congress had not made its intended unit of prosecution clear, thus, lenity required the less harsh of the two possible meanings. *See also State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (when a defendant is convicted of violating the same statute multiple times, the same evidence test will never be satisfied and the proper inquiry is what unit of prosecution the Legislature

intended as the punishable act under the specific criminal statute).

Sarausad reasons further that each of the elements of attempted first degree murder is necessarily included within the definition of completed first degree murder. It is not possible to commit first degree murder without attempting to do so. It is elementary that a defendant cannot be convicted of both attempting to murder a person and completing the murder of that same person by means of a single gunshot. From there, Sarausad, in a giant leap of logic, comes full circle by concluding that just as a defendant cannot be convicted of both attempting to murder one person and completing the murder of that same person by firing a single shot, neither can he be convicted of both attempting to murder one person but accidentally killing another person instead, by firing a single shot.

If for no other reason, this precariously structured analysis comes tumbling down when one considers that here, aided and abetted by Sarausad, Ronquillo fired not one shot but at least six and perhaps as many as ten shots-Sarausad himself testified that he heard ten shots. These shots were aimed directly at a group of young people, two of whom Ronquillo intended to kill, though only Fernandes was actually killed.

The double jeopardy clauses of the Fifth Amendment and Const. Art. 1, § 9 prohibit multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995) (citing *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)). Double jeopardy analysis in Washington is guided by the "same elements" test, which creates a

presumption that a defendant is subjected to double jeopardy if he or she is convicted of offenses that are identical both in fact and in law. *Calle*, 125 Wn.2d at 777. Two offenses are legally identical if proof of one offense would also necessarily prove the other. *Id.* However, double jeopardy is not implicated where each offense charged harms a different victim, as the offenses would thus not be identical in fact. *State v. McJimpson*, 79 Wn. App. 164, 169, 901 P.2d 354 (1995) (while charge of second degree assault with a deadly weapon was subsumed into charge of second degree felony murder and was thus identical in law, offenses were not identical in fact because each offense harmed a different victim).

Manrique v. Texas, 994 S.W.2d 640 (Tex. Crim. App. 1999) is instructive. There, the defendant claimed a double jeopardy violation for his conviction on two counts of attempted murder arising out of his act of firing at least 26 rounds from an AK-47 assault rifle into a house occupied by several persons. In a concurring opinion, the Texas court noted that "[t]his case involves 'multiple punishments' in a single proceeding for multiple violations of the same statute by different acts with different victims. Each round fired from the AK-47 assault rifle was a different and discrete act." *Id.* at 646 (citing *Blockburger v. United States*, 284 U.S. 299, 301-03, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Similarly, each of the at least six shots Ronquillo fired were different and discrete acts and double jeopardy is not implicated.

SRA CONSECUTIVE SENTENCING

Sarausad argues that the trial court erred in concluding that it was required to impose consecutive sentences for the second degree intentional murder and attempted murder convictions under the "serious violent" exception in RCW 9.94A.400(1)(b).

RCW 9.94A.400(1)(b) mandates that consecutive sentences be served "[w]henever a person is convicted of two or more serious violent offenses, as defined in RCW 9.94A.030, arising from separate and distinct criminal conduct[.]" Sarausad argues that the second degree intentional murder and attempted murder counts were not "separate and distinct criminal conduct" for purposes of the mandatory consecutive sentences statute.

"Separate and distinct criminal conduct" is not defined by the statute. However, "under RCW 9.94A.400, crimes which fail to meet the statutory definition of 'same criminal conduct' are necessarily 'separate and distinct.'" *State v. Brown*, 100 Wn. App. 104, 114, 995 P.2d 1278 (2000), *review granted in part*, 143 Wn.2d 1007 (2001). RCW 9.94A.400(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. . . . If one of these elements is missing, the multiple offenses do not encompass the same criminal conduct and, therefore, must be counted separately in calculating the offender score." *State v. Roose, Jr.*, 90 Wn. App. 513, 516, 957 P.2d 232 (1998) (citing *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)).

In *State v. Wilson*, a case in which defendant was charged with four counts of assault, based on multiple gunshots fired into a tavern, our Supreme Court noted that for purposes of consecutive sentencing under the statute, "[f]our assaults, involving four victims, involve four separate and distinct criminal acts-one for each victim." 125 Wn.2d 212, 220, 883 P.2d 320 (1994).[21] Here, each murder and attempted murder count involved separate victims: Fernandes, Lam and Nguyen. The trial court did not err when it imposed consecutive sentences for the counts, as mandated by RCW 9.94A.400(1)(b).

Sarausad nevertheless argues that offenses based on transferred intent are not "separate and distinct" for purposes of consecutive sentencing. But a "statute is not subject to judicial interpretation where its language is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning." *Roose, Jr.*, 90 Wn. App. at 518. Here, the statute clearly indicates that offenses involving different victims are not the "same criminal conduct," and thus are "separate and distinct." Absent statutory language to indicate otherwise, we cannot read into the statutory

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[21] *See also State v. Salamanca*, 69 Wn. App. 817, 827-28, 851 P.2d 1242 (1993) (Where offense involved firing a gun into an automobile occupied by several persons, and where defendant was charged as an accomplice on multiple assault counts, for purposes of "separate and distinct criminal conduct" under the sentencing act, "[t]he assaults in this case arise from separate and distinct conduct because they involve separate and distinct victims.")

language an exception based on transferred intent.[22] And we reject out of hand Sarausad's contention that the first degree murder statute, stating as it does that a person is guilty of first degree murder if with premeditated intent he kills a person "or" a third person, reflects a legislative intent to treat transferred intent cases as the same criminal conduct in all circumstances, even when multiple shots are fired at a group of people only two of whom

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[22] Moreover, although the prosecutor explained transferred intent to the jury as if it applied to both the murder and the assault, we do not agree with Sarausad's claim that the second degree murder charge was based on transferred intent. RCW 9A.32.050(1)(a) states that a "person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person[.]" Thus, once the mens rea is established, RCW 9A.32.050(1)(a), not the common-law doctrine of transferred intent, provides that a person is guilty of second degree murder if he or she intends to kill one person but accidentally kills another. *See Wilson*, 125 Wn.2d at 219 (transferred intent is only required when a criminal statute matches specific intent with a specific victim). While it is true that one can commit second degree murder by causing the death of the person one specifically intends to kill, RCW 9A.32.050(1)(a) does not require this, as indicated by the language "or of a third person." While Sarausad would have us believe that this language requires the State to elect between prosecuting "such person or a third person" when there is more than one victim arising from a transaction, and while he claims that this is shown by the fact that the language uses the disjunctive "or" rather than the conjunctive "and," his explanation leads to the nonsensical result that one cannot be guilty of second degree murder unless one causes the death of two people. Petitioner's Opening Brief at 36-37. Rather, the Legislature's use of "or" only indicates the Legislature's intent that the crime of second degree murder can be accomplished by killing an unintended third person.

the shooter intended to kill.

Sarausad's personal restraint petition is denied and dismissed.

/s/ Kennedy, J.

WE CONCUR:

/s/ ELLINGTON, J. /s/ COX, J.

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent,	)	
v.	)	NO. 66778-1
BRIAN KEITH RONQUILLO,	)	**ORDER**
Petitioner.	)	C/A NO. 35840-5-I
----------	)	(35875-8 consol.
STATE OF WASHINGTON,	)	w/ 35840-5-I)
Respondent,	)	
v.	)	
BRIAN KEITH RONQUILLO,	)	
JEROME MARK REYES,	)	
Defendants,	)	
And CESAR FRASCO	)	
SARAUSAD II, and	)	
Each of them,	)	
Petitioner.	)	

All five members of Department I of the Court considered the matters set on its September 29, 1998, Motion calendar, and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That both Petitions for Review are denied.

I CERTIFY THAT THIS ORDER
WAS ENTERED BY THE COURT
ON THIS 1st
DAY OF OCTOBER, 1998.

/s/ C.J. Merritt

C.J. Merritt, Clerk

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)
Respondent,	) NO. 35840-5-I
vs.	) NO. 35875-8-I
BRIAN KEITH RONQUILLO,	) (Consolidated)
Appellant.	) DIVISION ONE
	)
STATE OF WASHINGTON,	)
Respondent,	) UNPUBLISHED
vs.	) OPINION
BRIAN KEITH RONQUILLO,	)
JEROME MARK REYES,	)
Defendants,	)
and CESAR FRASCO	) Filed: Mar 02 1998
SARAUSAD II, and each of	)
them,	)
Appellant.	)
	)

BAKER, C.J. - On March 23, 1994, Ballard High School student Melissa Fernandes was killed in a drive-by shooting. The fatal gunshot was fired by Brian Ronquillo from a car driven by Cesar Sarausad. We consider Ronquillo's challenge to his conviction of first degree murder, two counts of attempted first degree murder, and assault in the second degree. We affirm, concluding that the trial court did not abuse its discretion by (1) declining

juvenile court jurisdiction, (2) rejecting a motion for mistrial due to alleged improper comments on Ronquillo's right to remain silent, and (3) refusing repeated motions to sever. The trial court was in the best position to make these discretionary rulings, which we will not upset on appeal. We also reject Ronquillo's argument that the jury instructions impermissibly broadened the charge against him.

Because gang activity was central to the events surrounding the shooting, we affirm the trial court's decision to admit expert testimony on gangs. We also affirm the discretionary evidentiary ruling to strike a portion of the gang expert testimony elicited by Ronquillo on cross examination because Ronquillo was not otherwise denied the right to cross examine the expert for bias. Finally, because we reject Ronquillo's assertion that the State put one of its witnesses on the stand for the primary purpose of eliciting testimony in order to impeach the witness with otherwise inadmissible evidence, we hold that the trial court did not abuse its discretion either by admitting the impeaching evidence or allowing it to be proved by extrinsic evidence.

In the consolidated appeal we consider Sarausad's challenge to current judicial interpretation of Washington's accomplice liability statute. Sarausad was convicted of murder in the second degree, two counts of attempted murder in the second degree, and assault in the second degree on the basis of accomplice liability.

To convict an accomplice of intentional murder, the State need not show that the accomplice had the intent to kill the victim; nor is the State required to prove that the accomplice specifically

intended to help the principal commit the substantive offense to convict the accomplice of that offense. We reject Sarausad's constitutional challenges to the accomplice liability statute, but acknowledge that Sarausad has raised interesting policy concerns about accomplice liability, a theory of criminal liability that in Washington has been reduced to the maxim, "in for a dime, in for a dollar".

We also hold that sufficient evidence was presented to support Sarausad's conviction under a correct interpretation of the accomplice liability statute. Finally, we hold that the trial court's response to jury inquiries regarding the intent element of accomplice liability did not constitute an abuse of discretion.

FACTS

On the day of the shooting, Ronquillo and Sarausad met with others at their usual gathering place. This group of young men associated with a gang called the 23rd Street Diablos (Diablos). Jerome Reyes[1] told the group that he had been chased by members of the Bad Side Posse (BSP). The Diablos and the BSP are rival gangs. After hearing about Reyes' encounter with the BSP, nine members of the Diablos went to Ballard High School to show that the Diablos were not afraid of the BSP. The Diablos went in two cars, Sarausad's car was in the lead.

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[1] Reyes was charged and tried with Ronquillo and Sarausad. The jury was unable to reach a verdict and a mistrial was declared as to Reyes. Reyes and Sarausad testified at trial, Ronquillo did not.

When the Diablos arrived at the school, words were exchanged between a group standing outside, identified as BSP, and the two cars filled with Diablos. Gang signs were flashed. The Diablos eventually got out of the cars, and a minor physical encounter ensued. When someone indicated that the police were nearby, the Diablos left. Eight witnesses testified that during this encounter at the school, they did not see a gun; four witnesses testified that they saw a gun in the possession of one of the Diablos.

The Diablos went to a member's house where they listened to music, ate and initiated a new member into the gang. Ronquillo obtained a gun from a fellow Diablo, and put the gun in his pants. The Diablos agreed to return to the school to show that they were not afraid of the BSP. The Diablos again went in two cars, with Sarausad's car in the lead. Ronquillo was in the front passenger seat, Sarausad drove.

Ryan Lam, Tam Nguyen and Melissa Fernandes were standing outside the school when they spotted the two cars parked nearby. The shooting occurred as one of the cars drove by the students. Lam noted that the shooter had a blue bandanna over his face. Ronquillo fired at least six shots. Fernandes died the next day from a penetrating gunshot wound on the left side of her head. Another student, Brent Mason, was apparently hit by a bullet fragment.

Ronquillo later transferred the gun to the other car. Knowing that his car could be identified, Sarausad drove the Diablos to Northgate Mall and left the group. At the mall, the Diablos walked

around and played video games. The next day, after a discussion with Ronquillo, a fellow Diablo threw the chopped-up pieces of the gun into the lake. It was never recovered.

Ronquillo and Sarausad were charged with premeditated first degree murder (count 1); the alternative charge of murder in the second degree (count 2; felony murder); attempted murder in the first degree (counts 3 and 4; attempted murder of Lam and Nguyen); and assault in the second degree while armed with a firearm (count 5; of Mason).

After a joint trial, the jury found Ronquillo guilty of counts 1, 3, 4 and 5. The jury found Sarausad not guilty of count 1, but guilty of the lesser offense of murder in the second degree. Sarausad was found not guilty of attempted murder in the first degree, but guilty of two counts of the lesser offense of attempted murder in the second degree, counts 3 and 4. Finally, the jury found Sarausad guilty of assault in the second degree.

I

ORDER DECLINING JUVENILE COURT JURISDICTION

The purpose of a decline hearing is to determine whether declination would be in the best interest of the juvenile or the public.[2] The decision to decline juvenile jurisdiction is discretionary, and is subject to reversal only for manifest abuse.[3] This

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[2] RCW 13.40.110(2); *State v. Jacobson*, 33 Wn. App. 529, 532, 656 P.2d 1103 (1982), *review denied*, 99 Wn.2d 1010 (1983).

[3] *Jacobson*, 33 Wn. App. at 533 (citing *State v. Foltz*, 27 Wn. App. 554, 556, 619 P.2d 702 (1980)).

exercise of discretion is informed by prior case law and by statute:

> First, the court must consider eight criteria promulgated in *Kent v. United States*, 383 U.S. 541, 566-67, 16 L. Ed. 2d 84, 86 S. Ct. 1045, 1060 (1966). Second, the court's exercise of discretion must be consonant with the purposes of the Juvenile Justice Act of 1977 which are, broadly, to provide for the handling of juvenile offenders through a separate and independent system providing both punishment and treatment where necessary.[4]

In making the decision, the court "shall consider the relevant reports, facts, opinions, and arguments presented by the parties and their counsel."[5] Ronquillo was 16.7 years old at the time of the offense.

At the decline hearing, the juvenile court heard testimony from two detectives and Ronquillo's probation officer. The court also reviewed statements made to the police and a report submitted by Ronquillo's probation officer. Ronquillo challenges the court's determination regarding two of the *Kent* criteria: his lack of sophistication and maturity, and his prospects for rehabilitation through the juvenile system.[6]

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[4] *State v. Holland*, 98 Wn.2d 507, 516, 656 P.2d 1056 (1983) (quoting *Foltz*, 27 Wn. App. at 556).

[5] RCW 13.40.110(2).

[6] The juvenile court found that four of the *Kent* criteria weighed heavily in favor of decline: (1) seriousness of the offense, (2) whether the offense was committed in an

According to Ronquillo, the record does not support the court's findings of fact related to the sixth *Kent* factor: the sophistication and maturity of the juvenile. We disagree. The probation officer testified about Ronquillo's ability to conceal his gang orientation from his parents. The court concluded that Ronquillo's maturity and sophistication weighed heavily in favor of decline. This conclusion is not based on untenable or manifestly unreasonable grounds, and was not an abuse of discretion.[7]

Ronquillo also challenges the court's findings regarding the eighth *Kent* factor: the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system. According to the probation officer, Ronquillo had adjusted well in detention, and the juvenile system could probably rehabilitate him. But she recommended a decline, testifying that in this case the public needs the protection of the adult system. The court did not abuse its discretion by following this recommendation.

Last, Ronquillo argues that the juvenile system could rehabilitate him. He notes that because of his age, he could serve the high end of the standard range penalty for the offense before turning

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aggressive, violent, premeditated or willful manner, (3) whether the offense was against persons or only property, and (4) the prosecutive merit of the complaint. The court found that the fifth *Kent* factor was neutral: the desirability of trial and disposition of the entire case in one court when the juvenile's associates are adults. Ronquillo's criminal history was the only factor that favored retention of juvenile jurisdiction.

[7] *See Foltz*, 27 Wn. App. at 556-57.

21,[8] as contrasted with the situation in *State v. Furman* and that court's decision to affirm declination.[9] A juvenile court, however, does not necessarily abuse its discretion by declining jurisdiction when the juvenile could serve the juvenile standard range penalty for the offense before turning 21. The court determined that neither community protection nor Ronquillo's rehabilitation could be guaranteed within the time left in the juvenile system, considering the circumstances of the crime and Ronquillo's lifestyle.[10]

All eight of the *Kent* factors need not be proven to support a decline; rather their purpose is to focus and guide the juvenile court's discretion.[11] The juvenile court expressly considered the *Kent* factors on the record and in written findings. The court also properly considered the purposes of the Juvenile Justice Act. The court's findings are supported by relevant facts and opinions produced at

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[8] *See* RCW 13.40.0357 (standard range, 180 to 224 weeks).

[9] *See State v. Furman*, 122 Wn.2d 440, 448, 858 P.2d 1092 (1993) (citing RCW 13.40.300(1)).

[10] *See Holland*, 98 Wn.2d at 517-18 (although a mental health expert agreed that declination was not in defendant's best interest, testimony supported caseworker's conclusion that when defendant's interest was balanced against the interest of society, interest of society must prevail; no abuse of discretion for court to agree).

[11] *Furman*, 122 Wn.2d at 447.

the hearing.[12] The court did not abuse its discretion by declining juvenile court jurisdiction.[13]

II

OVERBROAD INFORMATION

Ronquillo characterizes the information as charging him with the premeditated intent to cause the death of another person, that person being Fernandes. The court, however, instructed the jury that it could find him guilty if it found that he intended to cause the death of a third person, which resulted in the death of Fernandes. Ronquillo thus argues that the jury was instructed that it could convict him of a crime not charged. Ronquillo does not challenge the constitutionality of the information. Rather, he challenges the court's jury instructions.

Fairly read, the information charged Ronquillo with the premeditated intent to cause the death of another person, a person other than Fernandes. The information charged Ronquillo with murder in the first degree, committed as follows:

> That the defendant BRIAN KEITH RONQUILLO . . . in King County, Washington

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[12] *See* RCW 13.40.110(3).

[13] We grant Ronquillo's motion to extend time to file a pro se brief, and consider arguments raised in that brief although Ronquillo failed to file a timely notice of intent to file such a brief. *See* RAP 10.1(d). Ronquillo's pro se arguments regarding the order declining juvenile court jurisdiction are largely repetitive of those issues addressed above, and to the extent that they are new, they are without merit. Ronquillo also raises an ineffective assistance of counsel challenge, which we reject as inadequately briefed and likely without merit.

> on or about March 23, 1994, *with premeditated intent to cause the death of another person did cause the death of Melissa Ursula Fernandes, a human being, who died on or about March 24, 1994*[.]

(Emphasis added.) The jury was instructed that a person commits the crime of murder in the first degree "when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person."[14] The instruction tracks the statutory language.[15] The jury was also instructed that to convict Ronquillo of the crime of murder in the first degree, each of the following elements must be proved beyond a reasonable doubt:

> (1) That on or about the 23rd day of March, 1994, the defendant shot Melissa Ursula Fernandes;
>
> (2) That the defendant acted with intent to cause the death of another person;
>
> (3) That the intent to cause the death was premeditated;
>
> (4) That Melissa Ursula Fernandes died as a result of the defendant's acts; and
>
> (5) That the acts occurred in the State of Washington.[16]

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[14] Instruction 9.

[15] *See* RCW 9A.32.030(1)(a).

[16] Instruction 10.

The trial court determined that the information alleged premeditation with reference to the death of another person. We agree with the trial court that a fair reading of the information does not support Ronquillo's argument. Because the jury instruction and the information were coextensive, the "to convict" instruction did not impermissibly broaden the charge.

We also reject Ronquillo's related argument that the jury instructions impermissibly failed to require unanimity regarding whose death he intended to cause. To convict of a criminal charge, the jury must be unanimous that the defendant committed the criminal act.[17] The specific identity of the person intended to be killed is not an element of the crime of first degree murder. A slayer need not know the identity of the victim in order to form an intent to kill.[18] Ronquillo's right to jury unanimity was not violated as long as all 12 jurors believe, beyond a reasonable doubt, that he intended to kill another person. We hold that because *who* Ronquillo intended to kill is not an element of first degree

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[17] *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990).

[18] *State v. Hoffman*, 116 Wn.2d 51, 85, 804 P.2d 577 (1991) (citing *State v. Hettrick*, 67 Wn.2d 211, 219, 407 P.2d 150 (1965) (no error found when amended information charging defendant with first degree murder omitted the name of the person defendant had the specific intent to kill and inserted "a human being") and *State v. Collins*, 50 Wn.2d 740, 758, 314 P.2d 660 (1957) ("an intent to kill any specific person need not be proved; an intent to kill any person who may be at a certain place or who may attempt to do a certain thing is sufficient") (citing *State v. Baker*, 150 Wash. 82, 97, 272 P. 80 (1928))), *cert. denied by, McGinnis v. Blodgett*, 116 S. Ct. 1046 (1996).

murder, the court's failure to name the intended victim in the "to convict" instruction was not error.[19]

III

IMPEACHMENT OF STATE'S WITNESS

During its case in chief, the State asked one of its witnesses if Ronquillo said anything regarding aiming his gun shots. The witness responded, "No." The State confronted the witness with a prior statement made to police in which the witness attributed Ronquillo with the following statement: "I was aiming at the guy and the guy bent over, so I think I hit him." According to Ronquillo, the evidence should not have been admitted for any purpose because the only reason the State called the witness to testify was to present impeachent evidence in hopes that the jury would use it as substantive evidence.

ER 607 permits the credibility of a witness to be attacked by any party, including the party calling the witness. Although the State may impeach its own witness, "it may not call a witness for the

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[19] We reject Ronquillo's argument that because the pattern jury instruction for premeditated first degree murder leaves a blank for insertion of the name of the person the defendant intended to kill, the jury instruction in his case was erroneous. *See* 11 *Washington Practice*, WPIC 26.02 at 284 (1994). In *State v. Lee*, 128 Wn.2d 151, 158-59, 904 P.2d 1143 (1995), the court held that failure to include the victims in the "to convict" instruction for second degree theft was not error, relying in part on the fact that the instruction given mirrored the language of the relevant WPIC. The *Lee* court, however, also relied on case law holding that the name of the person from whom property is stolen is not an element of the crime. *Lee*, 128 Wn.2d at 158.

primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible."[20]

The record belies Ronquillo's argument that the witness's other testimony was merely cumulative. The witness was present during both trips to Ballard High School, and when the gun was handled after the shooting. The witness also testified that he had earlier heard what he thought was the sound of a gun being loaded, coming from Ronquillo. The trial court properly ruled that the State did not call the witness for the primary purpose of eliciting inadmissible testimony.[21]

Ronquillo also argues that the evidence was highly prejudicial and inadmissible under ER 403. A trial court has broad discretion in balancing the probative value of evidence against its possible prejudicial impact.[22] If a witness denies the prior statement, extrinsic evidence of the statement is admissible.[23] The trial court weighed the probative

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[20] *State v. Barber*, 38 Wn. App. 758, 770, 689 P.2d 1099 (1984) (citing *United States v. Miller*, 664 F.2d 94, 97 (5th Cir. 1981) and *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir. 1980)), *review denied*, 103 Wn.2d 1013 (1985); *see also State v. Lavaris*, 106 Wn.2d 340, 344-46, 721 P.2d 515 (1986) (affirming the rule announced in *Barber*).

[21] *See Lavaris*, 106 Wn.2d at 346 (holding that trial court did not err by admitting impeachment testimony when witness was integrally involved in the events leading up to the victim's death, participated in the murder, and the testimony corroborated testimony of other witnesses).

[22] *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987).

[23] *State v. Babich*, 68 Wn. App. 438, 443, 842 P.2d 1053, *review denied*, 121 Wn.2d 1015 (1993).

value and the potential for prejudice and decided to allow the testimony and a tape recording of the prior statement.[24] The trial court gave a limiting instruction to the jury both before and after playing the tape We presume that the jury follows the instructions of the court.[25] The trial court did not abuse its discretion by admitting the impeaching evidence or the manner of its proof.

IV

EXPERT TESTIMONY-GANG EVIDENCE

A. Admissibility

Trial courts have broad discretion in determining whether an expert witness is qualified, and will be reversed only for manifest abuse.[26] At trial, the witness testified that he had been a detective in the Seattle Police Gang Unit for four years, specializing in Asian gangs, and that he had attended conferences on various aspects of gangs. He had personal contact with gangs on a regular basis, and had previously testified as an expert on gang related matters in Juvenile Court.

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[24] The State argued that because an interpreter was involved, admission of the tape was important to show that the witness clearly made the statement.

[25] *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982); *see also State v. Hancock*, 109 Wn.2d 760, 766-67, 748 P.2d 611 (1988) (acknowledging the potential difficulty jury has in distinguishing between impeachment and substantive evidence, but concluding that trial court did not abuse its discretion by admitting out-of-court statement).

[26] *Harris v. Groth*, 99 Wn.2d 438, 450, 663 P.2d 113 (1983); *See also* ER 702.

Practical experience is sufficient to qualify a witness as an expert; the witness need not possess the academic credentials of an expert.[27] Ronquillo erroneously interprets *State v. Wilber* as requiring an expert to have specialized training or certification.[28] Given the detective's experience and training, the trial court's determination that he qualified as an expert was not an abuse of discretion. This is true even though there is no certification process for gang expertise.

Next, Ronquillo argues that the prejudice to him outweighed the probative value of the gang evidence. According to the State, the evidence was critical to its case. The fact that this was a fight between two rival gangs was inextricably intertwined with the crimes. Without the gang evidence, the crimes would appear motiveless and even more senseless than they in fact were. The trial

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[27] *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992) (citing *State v. Smith*, 88 Wn.2d 639, 647, 564 P.2d 1154 (1977), *overruled on other grounds by State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983)); *State v. Simon*, 64 Wn. App. 948, 963, 831 P.2d 139 (1991), *rev'd in part on other grounds*, 120 Wn.2d 196 (1992).

[28] *See State v. Wilber*, 55 Wn. App. 294, 299, 777 P.2d 36 (1989) (officers purported expert opinions were inadmissible when they did not elaborate on the nature of the training and, more importantly, when there was no evidence that the officers' opinions were based on a theory generally accepted by the scientific community). Ronquillo also argues that because there was no discussion of the detective's qualifications to testify as an expert on gangs in *State v. Campbell*, that case is wrongly decided under *Wilber*. *See State v. Campbell*, 78 Wn. App. 813, 1045, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995). *Campbell*, however, did not address this issue. *See Campbell*, 78 Wn. App. at 823.

court limited admission of the evidence of gang activity; it was not admitted as to specific instances of misconduct or violent acts by any individuals alleged to be gang members.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice".[29] In a doubtful case, the scale should be tipped in favor of the defendant and exclusion.[30] The trial court has broad discretion in balancing probative value against possible prejudicial impact.[31]

The challenged evidence was highly probative of the State's theory of the case--that the shooting was the result of a gang rivalry.[32] We reject Ronquillo's argument that the expert testimony was merely cumulative.[33] We hold that the trial court did

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[29] ER 403.

[30] *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

[31] *Rice*, 48 Wn. App. at 11.

[32] *See Campbell*, 78 Wn. App. at 822 (holding that evidence of gang affiliation and drug dealing was highly probative of the State's theory of the case). The State cites cases supporting the argument that gang evidence is admissible when it provides a motive for an otherwise inexplicable act. *See, e.g., United States v. Santiago*, 46 F.3d 885, 889 (9th Cir.) (noting that the court "specifically has admitted evidence relating to gangs and other organizations when relevant to the issue of motive") (citations omitted), *cert. denied*, 515 U.S. 1162 (1995).

[33] *See Campbell*, 78 Wn. App. at 823 (rejecting appellant's cumulative evidence argument because the State's experts generally testified to different aspects of gang behavior).

not abuse its discretion by admitting the gang expert's testimony, given the facts of this case.[34]

Finally, we reject Ronquillo's argument that the gang evidence allowed the jury to infer guilt by his association with a gang, and was therefore overly prejudicial. Although Ronquillo does not frame the argument in terms of a violation of his First Amendment right to association, this issue was raised and rejected in *State v. Campbell*.[35]

B. Right to Cross Examination

On cross examination of the gang expert, Ronquillo's attorney asked why a youngster of 15 or 16 would join a gang. Later, the attorney asked the witness: "So your basic approach to all of the youngsters in the 30-plus gangs in Seattle is that they are all criminals, correct?" The witness basically agreed. The court granted codefendants' motion to strike this portion of the testimony as beyond the scope of direct, and ruled that it would instruct the jury to disregard the expert's opinions as to why individuals may join a gang.[36] Ronquillo argues that this ruling denied him the right to cross

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[34] *See Rice*, 48 Wn. App. at 12 (relevancy of evidence depends on the circumstances of each case and the relationship of the facts to the ultimate issue). We decline to create a blanket rule that expert testimony on gangs is admissible in every case in which gang issues arise.

[35] *See Campbell*, 78 Wn. App. at 822.

[36] We reject Ronquillo's argument that the issue of the expert's proffered cross examination as beyond the scope of his expertise and direct examination was not raised below, and thus cannot be raised on appeal.

examine a key State witness to show bias and lack of credibility.

A criminal defendant has a constitutional right to confront and cross examine adverse witnesses.[37] Cross examination to elicit facts "which tend to show bias, prejudice or interest is generally a matter of right, but the scope or extent of such cross-examination is within the discretion of the trial court."[38] A criminal defendant is normally given extra latitude in cross examination to challenge the credibility of a key prosecution witness.[39] This extra latitude includes permitting questioning to draw out the opinions of an expert to a logical inconsistency or absurdity to show bias.

Although the trial court's determination that the evidence was improper cross examination and outside the scope of direct was quite technical, we decline to rule that the trial court abused its discretion by striking the challenged portion of the expert's testimony. The record reveals that Ronquillo's attorney had ample opportunity to cross examine the witness to reveal bias and lack of credibility.

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[37] *State v. Russell*, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

[38] *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980); *see also* ER 611(b).

[39] *See State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

V

IMPROPER COMMENTS ON RIGHT TO SILENCE

During closing arguments, counsel for each codefendant made statements that Ronquillo challenges as improper comments on his failure to testify. Counsel for Reyes made the following statement:

> Cesar Sarausad, the defendant, got his own counsel, Brian Ronquillo doesn't have to testify.
>
> He surprised everybody in that car. He knows he was trying to do something really cool, and he shot that girl to death.

Counsel for Sarausad made the following statement:

> Cesar testified. I would suggest that was a brave thing for him to do. The earlier actions were cowardly. He could easily have rested on the lack of evidence, could have argued lack of proof. But he chose to waive his Fifth Amendment privilege to remain silent to put his--
>
> [Objection]
>
> He chose to put his credibility on the line to subject himself to a very searching, thorough cross-examination to tell what happened, what he was thinking, why he did what he did.

Comments made by counsel for a codefendant regarding a defendant's failure to testify constitute

error and may require reversal.[40] When improper argument is alleged, the defense bears the burden of establishing the impropriety of the comments as well as their prejudicial effect.[41]

The trial court considered the improper comment by Reyes' attorney in context, and concluded that it was not so flagrant as to deny Ronquillo a fair trial. Although we do not agree with the trial court's determination that the argument by Sarausad's attorney did not comment on Ronquillo's assertion of his Fifth Amendment privilege not to testify,[42] we affirm.

In both instances, Ronquillo's attorney objected and moved for mistrial or severance, indicating that he was not asking the judge to instruct the jury regarding Ronquillo's right to silence, even though the court offered to do so. The attorney argued that an instruction would not cure the harm and would only reemphasize the

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[40] *See State v. Dickerson*, 69 Wn. App. 744, 747, 850 P.2d 1366 (holding that standard for addressing improper argument by a prosecutor provides the standard for evaluating improper argument by counsel for codefendant), *review denied*, 122 Wn.2d 1013 (1993).

[41] *Dickerson*, 69 Wn. App. at 747 (quoting *Hoffman*, 116 Wn.2d at 93).

[42] *See State v. Fiallo-Lopez*, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995) (defendant's Fifth Amendment rights are violated if the challenged statement is of such character that the jury would "'naturally and necessarily accept it as a comment on the defendant's failure to testify'") (quoting *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987) (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978), *review denied*, 91 Wn.2d 1013 (1979))).

comments. The trial court is in the best position to evaluate whether improper remarks may be cured, or require a mistrial based on the entire flow of the trial and the context of the remarks.[43] Because this is true, we defer to the trial court's assessment of the prejudicial impact, and whether such impact could be cured by an instruction to the jury.

We do not conclude that the comments were so prejudicial that a curative instruction would not have appropriately protected Ronquillo's interests. The "all or nothing" tactical choice made by Ronquillo's attorney to reject a curative instruction does not limit our consideration of the probable effectiveness of a strongly worded curative instruction. We hold that Ronquillo has failed to meet his burden of establishing that only a mistrial could cure the prejudicial impact of the challenged remarks.

VI

SEVERANCE

A trial court's denial of a motion for severance is reviewed for abuse of discretion.[44] Ronquillo properly renewed his motion for severance throughout the trial. We hold that Ronquillo has failed to meet his burden of establishing specific prejudice warranting reversal of the trial court's decision to deny severance.[45]

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[43] *Dickerson*, 69 Wn. App. at 748.

[44] *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994).

[45] *See Grisby*, 97 Wn.2d at 507.

First, Ronquillo argues that he was prejudiced by Reyes' impeachment with the following prior statement Reyes attributed to Ronquillo: "No, no. I thought they were BSP. Did I hit the guy? Did I hit the girl? Shit, I don't know what happened. I just saw her falling down." The court properly ruled that the statement was an admission, admissible as substantive evidence.[46] Use of admissible evidence does not interfere with a fair determination of the guilt or innocence of a defendant.[47]

The trial court exercised its discretion to strike a portion of the gang expert's testimony as outside the scope of direct. Ronquillo argues that the prejudicial effect of joinder is established by the conclusion that the proper remedy was to strike this testimony.[48] Ronquillo also argues that he was prejudiced by the cumulative effect of the comments on his right to silence, the attempts to place all culpability on him, and the fact that his defense and that of codefendants were irreconcilable.

Ronquillo's reliance on *De Luna v. United States* is misplaced.[49] In *De Luna* the comments

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[46] *See* ER 801(d)(2)(i).

[47] *Dent*, 123 Wn.2d at 485 (quoting CrR 4.4(c)(2)) (declining to hold that severance is necessary every time the State uses out-of-court statements of a codefendant that are admissible under evidence rules regarding use of hearsay).

[48] Although the trial court ruled that the challenged evidence was outside both the scope of cross and the witness's expertise, it also noted that it was striking the evidence in fairness to codefendants.

[49] *See De Luna v. United States*, 308 F.2d 140, 1 A.L.R.3d 969 (5th Cir.1962). The *Dickerson* court noted that in *De Luna*, defendant's conviction was reversed on the grounds

made by counsel for codefendant imputing guilt to De Luna were magnified by "the head-on collision between the two defendants, the repetition of the comments, and the extended colloquy over the comments between" the trial judge and the lawyers.[50] The court ruled that the codefendants must be tried separately.[51]

We are unable to conclude that the comments here were so flagrant as to warrant a mistrial, or that they were so repetitious that a limiting instruction would not have been effective, if so requested.[52] Furthermore, whether or not defenses are so antagonistic that they support a motion for severance is a factual question that must be proved by the defendant.[53] Because the trial court was in the best position to assess any prejudice, and because the court appears to have met its continuing duty to reassess that prejudice, we defer to the trial court, and hold that there has been no abuse of discretion. Finally, we reject Ronquillo's cumulative error

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that the defendant was prejudiced when the comments of codefendant's counsel sought to place all guilt and culpability on the nontestifying codefendants. *See Dickerson*, 69 Wn. App. at 749 n.6.

[50] *De Luna*, 308 F.2d at 154.

[51] *De Luna*, 308 F.2d at 155.

[52] *But see De Luna*, 308 F.2d at 154 (court's instructions could not undo prejudicial effects of the references to De Luna's silence).

[53] *See Grisby*, 97 Wn.2d at 508.

argument. We hold that there has been no cumulative error warranting reversal.[54]

VII

ACCOMPLICE LIABILITY

A. Intent Element

We turn now to the issues raised by Sarausad in the consolidated appeal. The jury found Sarausad not guilty of premeditated first degree murder, but guilty of the lesser offense of murder in the second degree on the basis of accomplice liability.[55] Sarausad challenges current judicial interpretation of Washington's accomplice liability statute, arguing that to convict a person as an accomplice to a substantive crime that requires proof of intent, the State must prove that the accomplice intended to help the principal commit that particular crime.

During closing argument, the State labeled Sarausad a classic accomplice, and declared that the law in Washington is "if you're in for a dime, you're in for a dollar." The accomplice liability statute states:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

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[54] *See Russell*, 125 Wn.2d at 93 (reversal may be required due to cumulative effects of trial court errors, even if each error alone would otherwise be considered harmless).

[55] Although Sarausad apparently challenges his conviction on all counts, his arguments focus on the second degree murder conviction.

(2) A person is legally accountable for the conduct of another person when:

. . .

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.[56]

The jury was instructed regarding the definition of an accomplice in a manner that mirrors the pattern jury instruction, WPIC 10.51:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime or

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[56] RCW 9A.08.020.

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.[57]

Sarausad misstates the law in Washington when he asserts that to be convicted as an accomplice, the State must prove that the accomplice had the mental state required for commission of the charged offense. His argument that an accomplice is only liable for that substantive offense which he willfully sought to bring about has specifically been rejected in Washington.

In order to convict an accomplice of intentional murder, the State need not show that the accomplice had the intent that the victim would be killed.[58] RCW 9A.08.020(3)(a) has no such requirement.[59]

Accomplice liability in Washington is premised on the following principles: (1) To convict of

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[57] Instruction 46.

[58] *See State v. Guloy*, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

[59] *Guloy*, 104 Wn.2d at 431; *see also Hoffman*, 116 Wn.2d at 104 (citing *Guloy* and quoting *State v. Bockman*, 37 Wn. App. 474, 491, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984)).

accomplice liability, the State need not prove that principal and accomplice shared the same mental state, (2) accomplice liability predicates criminal liability on general knowledge of a crime, rather than specific knowledge of the elements of the principal's crime, and (3) an accomplice, having agreed to participate in a criminal activity, runs the risk that the primary actor will exceed the scope of the preplanned illegality.[60]

There is no requirement that the jury determine which participant acted as the principal, and which acted as the accomplice.[61] This court cannot reinterpret accomplice liability case law without overruling Supreme Court precedent. This court does not have the authority to overrule the Supreme Court.

B. Constitutionality

Sarausad argues that current judicial interpretation of the accomplice liability statute is unconstitutional in that it violates the requirements of due process and the prohibition against cruel and unusual punishment. We reject these arguments, and uphold the constitutionality of the accomplice liability statute as interpreted.

Sarausad first argues that the statute violates due process because citizens lack fair notice of the

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[60] *See Bockman*, 37 Wn. App. at 491; *State v. Davis*, 101 Wn.2d 654, 657-59, 682 P.2d 883 (1984).

[61] *See State v. Carothers*, 84 Wn.2d 256, 265, 525 P.2d 731 (1974), *overruled on other grounds by State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984).

conduct that the statute criminalizes.[62] An accused person's constitutional right to be informed of the nature of the charges against him or her "is not violated when a defendant is found guilty as an accomplice even though the information did not expressly charge aiding or abetting or refer to other persons."[63] We hold that the accomplice liability statute withstands a void-for-vagueness challenge under similar reasoning.

Next, Sarausad argues that the statute is unconstitutional because punishing an accomplice to the same degree as a principal under the State's "in for a dime, in for a dollar" theory is cruel and unusual punishment. Sarausad, however, has not developed his cruel and unusual punishment arguments with the particularity required to permit adequate appellate review. Sarausad's analysis is limited to cases cited only for general principles of proportionality, and he fails to address his particular sentence in the context of other punishments and other states' accomplice liability statutes. Furthermore, although Sarausad has engaged in the necessary *Gunwall* analysis, he has done so

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[62] *See State v. Hilt*, 99 Wn.2d 452, 453-54, 662 P.2d 52 (1983) (to be consistent with due process, penal statute "must contain ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the enactment") (quoting *City of Seattle v. Drew*, 70 Wn.2d 405, 408, 423 P.2d 522, 25 A.L.R.3d 827 (1967)).

[63] *State v. Rodriguez*, 78 Wn. App. 769, 771, 773-74, 898 P.2d 871 (1995) (holding that this rule applies under current complicity rule in Washington), *review denied*, 128 Wn.2d 1015 (1996).

unconvincingly.[64] *State v. Dodd* rejected two of the arguments Sarausad makes in favor of interpreting the State constitutional provision more broadly than the Eighth Amendent.[65]

We note, however, that the accomplice liability statute likely does not violate the prohibition against cruel and unusual punishment given that in Washington the same criminal liability attaches to principal and accomplice because they share equal responsibility for the substantive offense.[66]

Although we uphold the constitutionality of the accomplice liability statute, we acknowledge the policy concerns underlying Sarausad's challenge to current judicial interpretation of the statute. Sarausad argues that the Washington Legislature did not intend to hold accomplices strictly liable for all crimes of the principal; that the State's "in for a dime, in for a dollar" theory violates legislative intent.

When the Legislature enacted the complicity statute as part of a revision of the criminal code it did not adopt the following Model Penal Code (MPC) provision:

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[64] *See State v. Dodd*, 120 Wn.2d 1, 21-22, 838 P.2d 86 (1992) (concluding that *Gunwall* factors do not demand that court interpret Const. art. 1, § 14 more broadly than the Eighth Amendment) (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986)). *But see State v. Thorne*, 129 Wn.2d 736, 773 n.1, 921 P.2d 514 (1996) (limiting *State v. Dodd* to its facts).

[65] *See Dodd*, 120 Wn.2d at 21-22 (difference in text and matters of local concern).

[66] *Rodriguez*, 78 Wn. App. at 772-73.

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.[67]

The code revisers commented that this section would be excluded from the Washington statute "as redundant".[68] According to Sarausad, this commentary proves that the drafters did not envision the overbroad use of the accomplice liability statute that has resulted.[69]

Sarausad also argues that Washington case law took an improper and illogical step from a rule that the accomplice need not share the same mental state as the principals to a rule that the accomplice need not possess the mental state required for conviction of the substantive offense. According to Sarausad, *State v. Davis* imposed a foreseeability standard applicable to accomplice liability that later courts abandoned, while inappropriately retaining the liability that could attach. Holding that the State was not required to prove that the accomplice

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[67] MPC § 2.06(4). RCW 9A.08.020 is substantially similar to MPC § 2.06. *See Rodriguez*, 78 Wn. App. at 773 n.1.

[68] *See* Legislative Council's Judiciary Committee, Without Prior Approval of the Contents, and Submitted to the People of the State of Washington for the Purpose of Obtaining Their Comments, at 45 (Olympia, 1970).

[69] It does not appear that the Supreme Court has addressed this aspect of the history of the accomplice liability statute.

had knowledge that the principal was armed to be convicted of first degree robbery, *Davis* noted:

> [T]his distinction recognizes that the Legislature has a valid interest in discouraging the use of deadly weapons by imposing strict liability on all those involved in robbery which, by its very nature, generally requires use of weapons to facilitate the act of illegally obtaining money from another by force.[70]

We recognize that Sarausad has raised issues that may be deserving of consideration by our Supreme Court. Current case law, however, states that an accomplice, "having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality."[71] Although the theory of accomplice liability may have departed from legislative intent, we are bound by Supreme Court precedent. The Legislature could amend the statute to include a provision similar to MPC § 2.06(4) if case law has deviated from its original intent. The Legislature has not done so. Finally, the facts of this case bring it within any foreseeability requirement that was arguably established in *State v. Davis*.

C. Jury Instructions

During their deliberation, the jury made three separate requests for clarification of the intent

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[70] *Davis*, 101 Wn.2d at 655, 659.

[71] *Davis*, 101 Wn.2d at 658.

element as applied to an accomplice.[72] The court responded by telling the jury to reread certain instructions and to consider the instructions as a whole. Sarausad argues that this response was an abuse of discretion because the trial court failed to clarify jury confusion.

Jury instructions are sufficient if they are readily understood and not misleading to the ordinary mind.[73] The decision whether or not to give further instructions to the jury after deliberations have begun is within the sound discretion of the trial court.[74] Although the jury may have been confused at the time of the inquiries, this situation could have changed during deliberations.[75] The jury's decision is contained exclusively in the verdict.[76]

We hold that there has been no abuse of discretion. The jury may have had difficulty understanding accomplice liability in general; however, Sarausad has not suggested a more concrete way to clear up the complexities.[77] The

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[72] For example, the jury indicated they were having difficulty agreeing on the legal definition and concept of "accomplice" and asked: "When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?"

[73] *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

[74] *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123, *review denied*, 104 Wn.2d 1010 (1985).

[75] *Miller*, 40 Wn. App. at 489.

[76] *Miller*, 40 Wn. App. at 489.

[77] *See Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1946).

accomplice liability instruction in this case, which mirrored the pattern jury instruction, WPIC 10.51, adequately instructs on the law of complicity.[78] Furthermore, we reject Sarausad's invitation to consider juror declarations indicating that the jury was confused about how the intent element applied to him.[79] Jurors' post-verdict statements regarding matters that inhere in the verdict cannot be used to attack the jury's verdict.[80] We reject Sarausad's other instructional error argument as meritless.

D. Sufficiency of the Evidence

According to Sarausad the evidence establishes that he was merely present at the scene, and was therefore insufficient to support his conviction of murder in the second degree based on accomplice liability. Physical presence and awareness of the transaction alone are not sufficient to establish accomplice liability.[81] An accomplice is criminally liable because of his intent to facilitate another in the commission of a crime by providing assistance through his presence or his act.[82]

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[78] *See State v. Laureano*, 101 Wn.2d 745, 769, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1988); *see also Bockman* 37 Wn. App. at 491-92.

[79] According to the declarations of two jurors, once the jury convicted Ronquillo as charged, it believed it could not find Sarausad guilty of anything less than murder in the second degree.

[80] *State v. Ng*, 110 Wn.2d 32, 44, 750 P.2d 632 (1988).

[81] *State v. Galisia*, 63 Wn. App. 833, 839, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992).

[82] *Galisia*, 63 Wn. App. at 840.

We view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt.[83] Sarausad's argument is seriously undermined by the record.

The evidence establishes that Sarausad was a willing and active participant in the events of that day. It is undisputed that Sarausad drove the car from which the shots were fired. At some point before the fatal shot was fired, Ronquillo put a bandanna over his face and pulled out the gun. Viewed in the light most favorable to the State, the evidence was sufficient to support Sarausad's conviction.

Although it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day, there is circumstantial evidence to suggest that Sarausad had such knowledge. Some members of the Diablos knew that there was a gun accessible to gang members. Four witnesses testified to seeing a gun during the first trip to the school. A Diablo who rode in Sarausad's car during the second trip testified that there was mention of the possibility of a shooting. Sarausad admits that he knew of the possibility of a fight--he agreed to participate in a gang confrontation. Sarausad's actions do not fall within the range of activities that would preclude accomplice liability from attaching to his

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[83] *Galisia*, 63 Wn. App. at 838.

involvement in the shooting.[84] We affirm Sarausad's conviction.

/s/ Baker, C.J.

WE CONCUR:

/s/ Grosse /s/ Coleman, J.

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[84] In his pro se brief, Sarausad argues that his involvement in the shooting was similar to that of the appellant in *State v. Luna*, 71 Wn. App. 755, 862 P.2d 620 (1993). In *Luna* there was no evidence that appellant had knowledge that his aid would promote or facilitate the crime. *Luna*, 71 Wn. App. at 760. The facts of this case are distinguishable.

No. 17

To convict the defendant, Cesar Frasco Sarausad of the crime of murder in the second degree (intentional), a lesser included offense of Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant, Cesar Frasco Sarausad, or an accomplice discharged a firearm;

(2) That defendant, Cesar Frasco Sarausad, or an accomplice acted with intent to cause the death of another person;

(3) That Melissa Ursula Fernandes died as a result of defendant, Cesar Frasco Sarausad's acts, or the acts of an accomplice; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 38

To convict the defendant Cesar Frasco Saruasad II of the crime of Attempted Murder in the Second Degree, a lesser included offense of count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant or his accomplice, did an act which was a substantial step toward the commission of Murder in the Second Degree of Ryan Lam;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 41

To convict the defendant Cesar Frasco Sarausad II of the crime of Attempted Murder in the Second Degree, a lesser included offense of count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant or his accomplice, did an act which was a substantial step toward the commission of Murder in the Second Degree of Tam Nguyen;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 45

You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

No. 46

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

No. 47

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

No. 48

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Wash. Rev. Code 9A.32.050 Murder in the second degree

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

Wash. Rev. Code 9A.08.020 Liability for conduct of another – Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability

is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise make a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

Wash. Rev. Code 9A.28.020 Criminal attempt

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

OPPOSITION BRIEF

No. 07-772

No. 07-8829

IN THE SUPREME COURT
OF THE UNITED STATES

DOUG WADDINGTON,
Petitioner/Cross-Respondent,

v.

CESAR SARAUSAD,
Respondent/Cross-Petitioner.

SARAUSAD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. RESTATEMENT OF QUESTION PRESENTED

Waddington's question presented assumes that the Ninth Circuit disagreed with the Washington courts on whether the accomplice liability instructions correctly stated Washington law. In fact, the Ninth Circuit accepted that the instructions tracked the language of the accomplice liability statute, and accepted the definitive interpretation of that statute provided by the Washington Supreme Court. Unfortunately, that interpretation came *after* Sarausad's trial and in a different case. The Ninth Circuit concluded that Sarausad's jury likely did not understand the law based on the following:

1. The prosecutor frankly argued an incorrect interpretation of accomplice liability to the jury, while the defense attempted to argue a correct interpretation.

2. The jury three times informed the trial court that it was confused on this critical issue, but the trial court refused to clarify the statutory language.

3. On direct appeal, the Washington Court of Appeals incorrectly interpreted the statutory language, leading it to conclude that the trial prosecutor's argument was correct.

4. Any evidence supporting conviction based on a valid theory of accomplice liability was either "thin" (according to the Ninth Circuit majority) or "nonexistent" (according to the concurrence).

On the unique facts of this case, the Ninth Circuit correctly found that relief was justified under 28 U.S.C. § 2254. Thus, there is no issue that could merit review by this Court.

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II. OPINIONS BELOW

Petitioner Waddington has correctly set out the opinions below.

III. JURISDICTION

Petitioner Waddington has correctly invoked this Court's jurisdiction.

IV. STATEMENT OF THE CASE

It is undisputed that Cesar Sarausad was driving his car when a passenger, Brian Ronquillo, suddenly pulled out a gun and shot into a group of students, killing one while attempting to kill two others. Waddington suggests that Sarausad drove to the scene "with knowledge" that Ronquillo "was armed and going to shoot." In fact, there was little or no evidence to support an inference that Sarausad knew of Ronquillo's intentions or even that Ronquillo was armed. Sarausad – and all of the State's witnesses – testified that the only plan was to confront a rival group of boys, yell at them, and perhaps engage in some pushing and shoving as they had done before. The facts are set out in detail in Sarausad v. Porter, 479 F.3d 671 (9th Cir. 2007), and in Sarausad's Conditional Cross-Petition. Judge Fletcher, writing for the Ninth Circuit majority, viewed the evidence that Sarausad knew of Ronquillo's murderous intentions as "thin." Pet. App. 52a. Judge Reinhardt, in concurrence, viewed it as "non-existent." Pet. App. 80a.

Sarausad's jury was instructed in the language of Washington's accomplice liability statute, Wash. Rev. Code § 9A.08.020:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit

the crime or

(2) aids or agrees to aid another person in planning or committing the crime.

Pet. App. 271a.

The trial prosecutor argued that, under this instruction, Sarausad was guilty even by his own testimony because he became Ronquillo's accomplice by agreeing to participate in *any* illegal activity. She repeatedly characterized this theory of accomplice liability as "in for a dime, in for a dollar." The defense argued that Sarausad could not be guilty of murder or attempted murder unless he knew that Ronquillo would commit those particular crimes.

Three times the jury sought clarification on this central issue. Although the defense asked the trial court to respond with further instructions, the court instead referred the jurors back to the instructions already given. The third question, which came on the *seventh* day of deliberations, reads as follows:

> We are having difficulty agreeing on the legal definition and concept of "accomplice."
>
> Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?

Pet. App. 60a-61a. Shortly after the trial court told the jurors to once again re-read their instructions, the jurors returned a verdict finding Sarausad guilty of second-degree murder, two attempted second-degree murders, and second-degree assault.

In his motion for a new trial, Sarausad attached statements from some of the jurors confirming that they were confused about accomplice liability and that they did not truly believe that Sarausad knew of Ronquillo's intentions. They described their own verdict as a "grave injustice."

On direct appeal, the Washington Court of Appeals considered "Sarausad's challenge to current judicial interpretation of Washington's accomplice liability statute . . . a theory of criminal liability that in Washington has been reduced to the maxim, 'in for a dime, in for a dollar.'" Pet. App. 234a-235a. It acknowledged that the trial prosecutor made such an argument. "During closing argument, the State labeled Sarausad a classic accomplice, and declared that the law in Washington is 'if you're in for a dime, you're in for a dollar.'" Pet. App. 256a. The Court rejected Sarausad's arguments, finding that the prosecutor correctly stated Washington law. Pet. App. 258a-263a. "[I]t was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day." Pet. App. 266a.

Shortly thereafter, the Washington Supreme Court rejected this interpretation of the law, clarifying in two other cases that accomplice liability attaches only when the alleged accomplice knew he was promoting or facilitating the *same* crime for which he was charged. State v. Cronin, 142 Wn.2d 568, 14 P.3d 752, 758 (2000); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).[1]

Sarausad then filed a postconviction petition, relitigating the accomplice liability issue in view of Cronin and Roberts.

> Although Sarausad raised these same issues in the direct appeal, he points out, and correctly so, that this court decided that appeal on the premise that "in for a dime, in for a dollar" correctly characterized Washington accomplice liability law.

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[1] There is no dispute that Sarausad may rely on the decisions in Cronin and Roberts. The Washington Supreme Court views those decisions as correctly stating the law as it existed ever since the accomplice liability statute was enacted. See In Re Domingo, 155 Wn.2d 356, 119 P.3d 816, 821 (2005).

Pet. App. 201a. In fact, Sarausad could not properly have been convicted of murder unless he knew that he was assisting in some form of homicide. Pet. App. 204a. Waddington concedes that to be a correct statement of Washington law. Petition at 10.

> Thus, when we concluded in the direct appeal that "it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gun play that day" we erred. Under Roberts, that is exactly what the State had to prove.

Pet. App. 205a. Nevertheless, the Court of Appeals somehow concluded that the State was not relieved of its burden of proof at trial. It managed this, in part, by coming up with a new interpretation of the trial prosecutor's "in for a dime, in for a dollar" argument. Pet. App. 208a-215a. The Court acknowledged that the jurors were confused about accomplice liability, but apparently viewed that as irrelevant since – in the Court's view – the confusion was not caused by incorrect instructions or improper argument. Pet. App. 215a. The Washington Supreme Court denied review of the Court of Appeals decisions in the direct appeal and in the posteonviction proceedings.

On federal habeas review, the district court granted relief on two grounds: 1) the evidence was insufficient to support the convictions; and 2) the State was relieved of its burden of proving all elements of accomplice liability. Pet. App. 125a-133a. On appeal, the majority of the Ninth Circuit panel reversed as to the first ground but affirmed as to the second. Sarausad v. Porter, 479 F.3d 671 (9th Cir. 2007). Pet. App. 31a-124a.

The panel majority set out the standard of review under 28 U.S.C. § 2254 and discussed this Court's cases interpreting it. Pet. App. 37a-39a. Though the evidence in support of Sarausad's convictions "was somewhat thin" and "circumstantial," the majority rejected

Sarausad's sufficiency claim. Pet. App. 53a (the Washington court "was not 'objectively unreasonable' in concluding that the Jackson[2] standard was satisfied.").

The Ninth Circuit then turned to Sarausad's claim that the jury instructions, the prosecutor's closing argument, and the trial court's failure to address the jurors' expressed confusion, relieved the State of its burden of proof. As the panel recognized, this Court has clearly established that the Due Process Clause requires every element to be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). This Court has applied that principle to jury instructions that have the effect of relieving the State of its burden of proof. Sandstrom v. Montana, 442 U.S. 510 (1979). The standard for reviewing ambiguous instructions is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Estelle v. McGuire, 502 U.S. 62 (1991) (citations and internal quotations omitted). This Court has noted that, while "arguments of counsel generally carry less weight with a jury than do instructions from the court," they may sometimes "have a decisive effect on the jury." Boyde v. California, 494 U.S. 370, 384 (1990). See Sarausad v. Porter, Pet. App. 53a-55a.

Tracking the requirements set out by this Court in Estelle, the Ninth Circuit first addressed whether the jury instructions in this case were ambiguous and, then, whether "in the context of the instructions as a whole and trial record" there was a "reasonable likelihood" that the jury applied the instructions in a way that violated the Constitution. Sarausad v. Porter, Pet. App. 68a.

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[2] Jackson v. Virginia, 443 U.S. 307, 318 (1979).

The Ninth Circuit found the instructions ambiguous for three reasons. First, the instructions never explicitly stated that the accomplice must have knowledge of the actual crime committed by the principal. The instructions stated that a person is guilty of "a crime" if he is an accomplice to "the crime" but nowhere specified whether the articles "the" and "a" referred to the crime of which the accomplice had knowledge or the crime that the principal happened to commit. Second, the Washington Supreme Court held that a very similar instruction in Roberts allowed the jury to improperly convict based on the "in for a dime, in for a dollar" theory. The panel recognized that the instruction in Roberts - unlike in Sarausad's case – differed slightly from the statutory language, but noted that changing a single word from "a" to "the" hardly cleared up the confusion. "Third, and perhaps most revealing, the Washington Court of Appeals on direct appeal held that the instructions given in Sarausad's case were consistent with the Washington statute, and that both the instructions and the statute were based on the 'in for a dime, in for a dollar' theory of accomplice liability." [1] If the judges on the Washington Court of Appeals could interpret the accomplice liability statute in Sarausad's case to permit conviction even if Sarausad did not know that Ronquillo planned to kill, then obviously the laypeople on the jury could do the same. The panel was "hard pressed to read the instructions as unambiguously instructing the jury to do precisely the opposite." Pet. App. 69a-72a.

> The Washington courts have had serious difficulty parsing the Washington accomplice liability statute's knowledge requirement, at times holding that it permits an "in for a dime, in for a dollar" theory, and at times holding the opposite. The jury instructions in Sarausad's case, which essentially tracked the statutory language, were no less confusing than the statute itself."

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[1] The Washington Court of Appeals confirmed in In re Smith, 117 Wn. App. 846, 857, 73 P.3d 386 (2003) that Cronin and Roberts changed its understanding of accomplice liability

Pet. App. 74a.

The Ninth Circuit then found, for four reasons, a likelihood that this ambiguity led the jury to misapply the instruction in Sarausad's case. First, "the jury convicted Sarausad despite the thin evidence that Sarausad knew of Ronquillo's intent to commit murder," suggesting "that the jury incorrectly believed that such proof was not required." Second, "the prosecutor argued clearly and forcefully for the 'in for a dime, in for a dollar' theory of accomplice liability." Third, the jury expressed substantial confusion about accomplice liability in its questions to the trial court, yet the court provided no assistance. Fourth, after the Washington Supreme Court clarified the law in Roberts and Cronin, the Washington Court of Appeals was able to deny Sarausad's postconviction petition only by misstating the record. Pet. App. 74a-78a.

Because it was so obvious that Sarausad's jury was confused about the requirements for accomplice liability, the Ninth Circuit had little difficulty concluding that the state court's decision to the contrary was an unreasonable application of the U.S. Supreme Court's holdings in Winship, Sandstrom and Estelle. Pet. App. 79a. Further, because Sarausad's only defense was that he did not know that Ronquillo planned to commit murder, the error clearly had a "substantial or injurious effect or influence in determining the jury's verdict." Pet. App. 78a, quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

V. REASONS WHY THE PETITION SHOULD BE DENIED

A. THE NINTH CIRCUIT DID NOT REJECT THE WASHINGTON COURTS' INTERPRETATION OF ITS OWN LAW

Waddington's arguments all flow from the premise that the Ninth Circuit "disregarded the state court determination of state law that the instructions given in Sarausad's trial properly

instructed the jury as to accomplice liability under Washington law." Petition at 17. In fact, as discussed above, the Ninth Circuit accepted that the instructions tracked the language of the relevant statute, and accepted the Washington Supreme Court's definitive interpretation of the statutory language.

Waddington interprets the Washington Supreme Court's analysis in Roberts and Cronin to turn solely on the jury instructions using the article "a" before the word "crime" whereas the accomplice liability statute used the article "the." See Petition at 20-21. In fact, the central issue before the Washington Supreme Court was whether the *statutory* language created strict liability for all crimes committed by the principal or only liability for crimes of which the accomplice had knowledge. See Roberts, 142 Wn.2d at 510-13; Cronin, 142 Wn.2d at 578-79.[4] In both cases, the King County Prosecutor (the same office that prosecuted Sarausad) argued to the Washington Supreme Court that the statute created strict liability. Roberts at 509; Cronin at 578 (in the prosecutor's view "accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of *any* crime"). Further, as in Sarausad's case, the trial prosecutors in Roberts and Cronin told the jury that they need not prove that the defendant knowingly assisted in the crime charged. Roberts at 506 (prosecutor argued that Roberts could be convicted even if he planned only to silence victim by tying him to a chair and taping his mouth, while Cronin decided to kill victim); Cronin at 576 (prosecutor argued that Cronin could be guilty of Roberts's murder if he agreed to aid in any "assaultive behavior:" Cronin was "in for a dime, in for a dollar").

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[4] Roberts and Cronin were codefendants in the same aggravated murder case. The two decisions issued on the same day

Similarly, in In re Swenson, 154 Wn.2d 438, 452-55, 114 P.3d 627 (2005)[5], the *same* deputy King County prosecutor who tried Sarausad's case argued at trial that the defendant was guilty of his codefendant's murder if he agreed to assist in any crime, including theft. She repeatedly characterized that principle as "in for a dime, in for a dollar." Id. at 452. As in Sarausad's case, the Washington Court of Appeals rejected Swenson's claim because it did not have the benefit of Roberts and Cronin. See Swenson, 154 Wn.2d at 455-56. Unlike in Sarausad's case, the Washington Supreme Court took review and reversed. Swenson, 154 Wn.2d at 456.[6]

In Roberts, Cronin, and Swenson, the King County prosecutors argued an incorrect interpretation of accomplice liability at trial and on direct appeal. They made these arguments *after* convicting Sarausad. Ironically, the State now contends that Sarausad's jurors could not have interpreted the statutory language in the same way that the State itself did at the time.

As further evidence that the statutory language is ambiguous, four Justices of the Washington Supreme Court dissented in Cronin. In their view, the statute, and prior case law interpreting it, permitted an accomplice to be convicted of crimes other than those in which he knowingly participated. Cronin, 142 Wn.2d at 586-91.

To be sure, the fact that the jury instructions in Roberts and Cronin slightly altered the statutory language was *one* factor in deciding whether the jurors misunderstood the law. The Washington Supreme Court focused more, however, on the same factors at issue in this case: the

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[5] Consolidated with State v. Evans.

[6] The Washington Supreme Court did later note, however, that the Washington Court of Appeals' decision in Sarausad's case was inconsistent with the holdings in Roberts and Cronin. See In re Domingo, 155 Wn.2d at 367-68 n.7.

prosecutor's arguments to the jury, questions send out by the jurors, and the trial court's inadequate response to the questions. See, e.g., Cronin, 142 Wn.2d at 580-81[7]. It is absurd to suggest that changing a single "a" to "the" will invariably clear up any confusion. As the discussion above shows, the meaning of the statutory language is hardly self-evident even when the correct article is used.

Waddington further misstates the Ninth Circuit's opinion by suggesting that it imposed some duty on the Washington courts to give, in all cases, further clarifying instructions beyond the statutory language. In fact, the Ninth Circuit merely noted in passing that the trial court could easily have cleared up the jurors' expressed confusion in this case with a brief, clarifying instruction. Sarausad v. Porter, Pet. App. 69a-70a. (Most likely, the trial court declined to clarify because it too was confused about the state of the law.)

Waddington contends that the Ninth Circuit's decision conflicts with Henderson v. Kibbe, 431 U.S. 145 (1977), but that case is readily distinguishable. In Henderson, the New York trial court instructed the jury that the defendant could be guilty of murder only if his reckless conduct caused the victim's death. The defense did not request further clarification regarding causation and the jury sent out no questions. Kibbe later sought habeas relief because the jury was not expressly told that, under New York case law, causation required forseeability. This Court declined to find constitutional error based on the failure to give an instruction that was not even requested. Id. at 154. Further, the petitioner's suggestion that an additional instruction could have affected the verdict was "too speculative" Id. at 157. It based that on "[a] fair evaluation of the omission in the context of the entire record." Id. at 156. Among other

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[7] All three of these factors applied to defendant Roe, whose case was consolidated with Cronin's

things, the lawyers for both sides assumed that the State must prove foreseeability and made appropriate arguments that the death was or was not foreseeable. Id. at 148-49. Sarausad, of course, is not contending that the instructions given in his case would, in and of themselves, give rise to a constitutional violation. He is relying on clear, non-speculative, evidence that the jurors did not understand the burden of proof.

B. THERE IS NO CONFLICT WITH OTHER CIRCUITS

Once again, Waddington begins with the mistaken premise that the Ninth Circuit refused to accept the state courts' interpretation of state law. Petition at 23. Had the Ninth Circuit truly done that, then obviously its decision would have conflicted not only with that of other circuits but also with controlling authority from this Court.

What Waddington has actually presented is a few cases from other circuits dealing with claims somewhat similar to Sarausad's but denying relief. There is no reason to believe, however, that the Ninth Circuit would have decided those cases any differently than did the Third, Tenth, or Eleventh Circuits. Each case dealt with factual and legal issues readily distinguishable from those is this case.

In Jamerson v. Secretary for the Dept. of Corrections, 410 F.3d 682 (11th Cir. 2005), the petitioner contended that the jury instructions, the juror's questions, and the trial court's answers to them, relieved the State of its burden of proving all elements of accomplice liability. Contrary to Waddington's summary, the Eleventh Circuit did *not* rule that such a claim was precluded whenever the instructions given were a correct statement of the law. Rather, after concluding that the instructions were correct, the Court went on to "consider the questions of the jury and the answers provided by the trial court." Id. at 689. When viewing the entire proceedings "as a

whole" and considering the challenged instructions "in context" the Court found no due process violation. Id. at 689-90. Unlike in Sarausad's case, the trial court in Jamerson did respond to the juror's questions with further clarification. Id. at 685. Further, there was no suggestion in Jamerson that the trial prosecutor argued an incorrect interpretation of the law or that the lower Florida courts misunderstood the law at the time of Jamerson's trial.

In Priester v. Vaughn, 382 F.3d 394 (3d Cir. 2004), the petitioner contended that his lawyer was ineffective in failing to object to the accomplice liability instructions. Priester maintained that the instructions misstated the elements under Pennsylvania law. That argument failed because the Pennsylvania Supreme Court held in another case that the same instructions did correctly state the elements. Id. at 401-02. Unlike Sarausad, Priester never contended that he was convicted on a theory *contrary* to the one ultimately approved by the state courts.

The remaining cases cited by Waddington all stand for the same unremarkable proposition: state courts are the final arbiters of the elements of state crimes. In Rael v. Sullivan, 918 F.2d 874 (10th Cir. 1990), for example, the petitioner claimed he was improperly convicted of extortion because the State never proved all the elements. Mr. Rael threatened to harm a mental health counselor unless she gave him a copy of his evaluation. Id. at 874-75. The State conceded that Rael had a right to the evaluation, id. at 875, a fact which would have precluded an extortion charge under the law of many jurisdictions, id. at 877. However, because New Mexico did not require the defendant's objective to be wrongful, Rael's claim failed. Id. at 876.

None of the cases cited by Waddington dealt with the issue presented here: a conviction based on a legal theory *inconsistent* with state law.

C. THE NINTH CIRCUIT DID NOT FAIL TO GIVE PROPER DEFERENCE TO THE STATE COURT ADJUDICATION OF FEDERAL LAW

It is true that "[T]he Ninth Circuit found a reasonable likelihood that the jury misapplied the jury instructions so as to relieve the prosecution of the burden of proving every element beyond a reasonable doubt." Petition at 26. Once again, however, Waddington assumes that the Ninth Circuit's decision was based *solely* on the wording of the jury instructions. Id. at 26-27.

The Ninth Circuit expressly acknowledged AEDPA's deferential standard of review. Sarausad v. Porter, Pet. App. 37a-39a. As this Court has emphasized, however, "deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

Waddington complains in particular that the Ninth Circuit substituted its judgment for that of the state courts about whether the trial prosecutor misstated the law in her closing argument. In Waddington's view, this was a determination of state law binding on the federal courts. Petition at 29-30. The question, however, is not whether a strict liability theory is correct under Washington law. Both sides agree that it is not. The question is whether the jury may have understood the prosecutor to be arguing for strict liability. Federal courts are free to consider whether a prosecutor's argument may have confused the jury. See Penry v. Johnson, 532 U.S. 782, 802 (2001) ("the prosecutor effectively neutralized defense counsel's argument" concerning interpretation of jury instruction); Simmons v. South Carolina, 512 U.S. 154, 162 (1994) (prosecutor's argument increased likelihood that jury would mistakenly interpret jury instruction's reference to a "life" sentence to include the possibility of parole); Richardson v. Marsh, 481 U.S. 200, 211 (1987) (although jury was properly instructed that it could not consider codefendant Williams's confession against Marsh, Marsh might be entitled to relief on

remand because "the prosecutor sought to undo the effect of the limiting instruction by urging the jury to use Williams's confession in evaluating respondent's case"). The state court's decision is entitled to deference but is not definitive.

Here, the Ninth Circuit had ample reason to conclude that the Washington Court of Appeals' ultimate interpretation of the prosecutor's argument was unreasonable. For one thing, the Ninth Circuit's interpretation was actually the *same* as that of the Court of Appeals during the direct appeal. It was also the same as the Washington Supreme Court's understanding of the phrase "in for a dime, in for a dollar." See In re Swenson, 154 Wn.2d at 452; State v. Cronin, 142 Wn.2d at 576. The Ninth Circuit disagreed only with the new, tortured interpretation of the prosecutor's argument given later by the Court of Appeals during the postconviction proceedings in Sarausad's case.[8]

Further, as the Ninth Circuit noted, the Court of Appeals' new interpretation was "flatly contradicted by the record." Pet. App. 67a. In fact, "the prosecutor argued clearly, emphatically, and repeatedly that Sarausad could be convicted of accomplice liability for murder even if he believed that Ronquillo intended merely to commit assault." Id. Among other things, the prosecutor's argument included the following:

> Let me give you a good example of accomplice liability. A friend comes up to you and says, "Hold this person's arms while I hit him." You say, "Okay, I don't like that person anyway." You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, "Well, I only intended this much damage to happen." . . . The law in the State of Washington says, if you're in for a dime, you're in for a dollar.

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[8] As noted above, the same trial prosecutor made the impermissible "in for a dime, in for a dollar" arguments in the trials of Sarausad and Swenson. She was no doubt surprised to learn that the meaning of the phrase changed from one trial to the other.

Pet. App. 67a (quoting trial transcript). It is impossible to reconcile that argument with the legal standard set out in Roberts and Cronin.

Waddington also argues that the jurors' confusion was surely cleared up by the trial court's admonition to re-read the instructions. Petition at 32.[9] If the Washington Court of Appeals could misread the same instructions, however, then obviously the jurors could as well. Further, the jurors repeatedly asked for clarification after being referred back several times to the same instructions, demonstrating that the instructions themselves did not clear up the confusion.

For these reasons, Waddington's reliance on Weeks v. Angelone, 528 U.S. 225 (2000), is misplaced. In Weeks the jurors asked whether they were required to impose death if they found that the State had proved a sufficient aggravating factor. The judge referred the jurors to a specific and unambiguous paragraph of a jury instruction and the prosecutor did not argue an incorrect theory of the law. This Court concluded that the unambiguous instruction could be presumed to clear up the juror's confusion. Such reasoning cannot apply in this case when the prosecutor urged an incorrect interpretation of the instruction on the jury and a three-judge panel of the Washington Court of Appeals unanimously interpreted the instruction incorrectly as well.

Waddington's position seems to be that a petitioner can *never* raise a claim of juror confusion if the jury is instructed in the language of the relevant statute. That would be a novel and unfair rule. "Correct" jury instructions may nevertheless be confusing under some circumstances. See Simmons, 512 U.S. at 169-70 (although jury was correctly informed that alternative to death sentence was a sentence of "life," jury may not have understood that this

meant there was no possibility of release). As Washington's experience pointedly illustrates, the meaning of a statute is not always clear. In Sarausad's case, the trial prosecutor and three judges of the Washington Court of Appeals misinterpreted the statute. It is not surprising that the jurors could not understand it. It is true that the Washington Court of Appeals later corrected its interpretation of the law during the postconviction proceedings. But the issue here is not how the state appellate courts ultimately interpreted accomplice liability, but how the jurors may have understood it. See Sandstrom, 442 U.S. at 516-17 ("The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana law, but it is not the final authority on the interpretation which a jury could have given the instruction.").

Finally, Waddington argues that the Ninth Circuit improperly substituted its judgment for that of the State courts regarding the strength of the State's case. Petition at 30-31. However, "[a] federal court has the duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in state court." Jackson v. Virginia, 443 U.S. 307, 318 (1979). See also, Williams v. Taylor, 529 U.S. 362, 397-98 (2000) (finding state court's assessment of the strength of mitigating evidence to be unreasonable). As the Ninth Circuit carefully explained, many of the Washington Court of Appeals' comments about the facts of the case were simply not supported by any evidence in the record. See Sarausad v. Porter, Pet. App. 44a-50a.

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[4] Waddington knows that to be incorrect, since the jurors swore in affidavits that they did *not* understand accomplice liability and that their verdict was a mistake. Sarausad recognizes, as did the Ninth Circuit, that juror affidavits cannot be used to impeach a verdict. Waddington should not argue a position, however, that is factually false.

VI. CONCLUSION

The decision below presents no consideration that fits within the criteria set forth in Rule 10. The Ninth Circuit carefully applied this Court's precedent to the unique facts of Sarausad's case. There is no genuine split of authority between the circuits. Although Waddington contends that the Ninth Circuit erred, he does not suggest that this error would affect anything other than this particular case. Indeed, Waddington does not cite to any other jurisdiction that uses a similar jury instruction. The Ninth Circuit decision sets no controversial precedent, but merely requires the King County prosecutors to retry a single case. In view of the serious errors at Sarausad's trial, a retrial would hardly cause injustice.

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this ____ day of February, 2008.

DAVID B. ZUCKERMAN
PATRICIA S. NOVOTNY
Attorneys for Respondent/Cross-Petitioner

REPLY BRIEF

86

(3)

NO. 07-772

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Waddington seeks review of the Ninth Circuit's decision that affirmed the grant of habeas relief vacating Sarausad's convictions for murder and attempted murder. The Ninth Circuit held the accomplice liability instructions in Sarausad's trial were so ambiguous that there was a reasonable likelihood the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all of the elements of the crime. In so holding, the panel majority disregarded the state court ruling that the instructions correctly set forth the elements of accomplice liability under state law, and the majority failed to give proper deference to the state court adjudication of the federal claim.

Sarausad argues the panel majority accepted the state court rulings on state law, but still properly found constitutional error. Sarausad contends the court correctly found the instructions ambiguous because the instructions did not sufficiently explain accomplice liability, the Washington Supreme Court found a "similar" instruction allowed for an improper conviction, and the state appellate court had initially found the instructions appropriate based upon that court's misunderstanding of state law. Br. Opp. at 7. Sarausad argues the Ninth Circuit properly held that the instructions violated due process, and found the state court decision to the contrary was objectively unreasonable, because the jury likely misapplied the accomplice liability instructions so as to relieve the prosecution of the burden of proving the elements of the crime beyond a reasonable doubt. Br. Opp. at 14-17. Sarausad's defense of the panel majority's decision is untenable.

The panel majority disregarded the state court rulings on state law, and conducted their own analysis of state law to find the instructions did not sufficiently explain accomplice liability. The circuit court then concluded the state court decision was objectively unreasonable even though this Court has never found a due process violation arising from an instruction correct under state law that required proof beyond a reasonable doubt, did not create a presumption, and did not shift the burden of proof.

ARGUMENT

1. Sarausad Mischaracterizes The Decision By Arguing The Ninth Circuit Accepted The State Court Rulings On State Law.

Waddington's petition demonstrated how the panel majority disregarded the state court determination that the jury instructions properly set forth the elements of accomplice liability under Washington law. Pet. at 17-23. Waddington's petition further demonstrated how the Ninth Circuit's decision conflicts with the decisions of the Third, Tenth, and Eleventh Circuits because those circuit courts accepted the state court determination of state law in reviewing a claim of instruction error. Pet. App. 23-26. Sarausad agrees a circuit court's refusal to accept the state court determination of state law would create a conflict. Br. Opp. at 12 ("Had the Ninth Circuit truly done that, then obviously its decision would have conflicted not only with that of other circuits but also with controlling authority from this Court."). Recognizing that a conflict exists, Sarausad seeks to avoid certiorari by mischaracterizing the Ninth Circuit's decision.

Sarausad claims "the Ninth Circuit accepted that the instructions tracked the language of the relevant statute, and accepted the Washington Supreme Court's definitive interpretation of the statutory language." Br. Opp. at 9. But Sarausad mischaracterizes the Ninth Circuit's decision.

Rejecting the state court ruling that the instructions properly set forth the elements of accomplice liability under Washington law, the Ninth Circuit concluded the instructions were defective because they did not clearly set forth the elements of accomplice liability. Pet. App. 70a-71a. The panel majority held:

> "Because it uses the words 'the crime' where Instruction 7 in *Roberts* used the words 'a crime,' Instruction 45 in Sarausad's case does not invite an erroneous construction to the same degree as the flawed instruction in *Roberts*. Indeed, using the words 'the crime,' Instruction 45 tracks the wording in the Washington accomplice liability statute more closely than Instruction 7. *But the simple change from 'a crime' to 'the crime' in Instruction 45 does not, in our view, make the jury instructions in Sarausad's case unambiguous, for the basic problem identified above remains: There is no sentence in the instructions specifically instructing the jury that a person can be guilty of 'a crime' as an accomplice only if that persons knows that 'a crime' is 'the crime' the principal intends to commit.*" Pet. App. 71a (emphasis added).

Contrary to Sarausad's argument, the panel majority did not simply note "in passing that the trial court could easily have cleared up the jurors' expressed confusion in this case with a brief, clarifying instruction." Br. Opp. at 11. Rather, the panel majority found the instruction was improper because there was "*no sentence in the instructions specifically instructing the jury that a person can be guilty of 'a crime' as an accomplice only if that persons knows that 'a crime' is 'the crime' the principal intends to commit.*" Pet. App. 71a (emphasis added).

The dissenting judges recognized that the panel majority disregarded the state court determination of state law. Dissenting from the panel's decision, Judge Bybee stated:

> "Of course, the majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts. In fact, the Washington Supreme Court's express approval of the *Davis* instruction belies the existence of such a requirement. *See Roberts*, 142 Wash.2d at 511-12, 14 P.3d at 736. Contrary to the majority's argument, the corrected instruction alone in *Davis*, as here, sufficiently cured the defective language without any further explanation." Pet. App. 112a.

Judge Callahan, writing for the five judges who dissented from the denial of rehearing *en banc*, agreed the panel majority ignored the state court ruling on state law. Pet. App. 5a-14a. Judge Callahan stated:

> This is fundamentally a case about Washington state's right to define the parameters of accomplice liability under its own state law. The panel majority not only misinterprets Washington law but also refuses to accord the Washington courts the required deference required by well established precedent and basic principles of federalism. By doing so, the panel majority elevates what it considers to be a Washington state court's mistake in interpreting Washington state law into a constitutional violation. As a result of our lack of deference, our court takes the unprecedented step of rejecting a standardized state jury instruction that the Washington Supreme Court has expressly approved as correctly stating the limits of accomplice liability under state law." Pet. App. 2a.

Thus, contrary to Sarausad's argument, the panel majority refused to accept the state court determination that the jury instructions correctly set forth accomplice liability under Washington law.[1] For this reason, the Ninth Circuit's decision conflicts with the decisions of other circuit courts and of this Court, and even Sarausad agrees that this conflict exists. Br. Opp. at 12. This Court should grant the writ to resolve this conflict.

---

[1] Sarausad himself continues to assert that the state court erred in analyzing Washington law. Arguing that he was convicted based upon a legal theory inconsistent with Washington law, Sarausad implies that the Washington Court of Appeals erroneously analyzed state law in his personal restraint petition proceeding. Br. Opp. at 10 n.7.

2. Sarausad's Re-characterization Of The Decision Does Not Provide An Alternative Basis To Support The Result Reached By The Ninth Circuit.

Sarausad mischaracterizes the Ninth Circuit's decision to support his argument that certiorari should be denied. This mischaracterization comes in two parts. First, Sarausad incorrectly claims the circuit court accepted the state court determination of state law. Br. Opp. at 9. As Waddington explained above, this characterization is inaccurate. Second, Sarausad argues that "'[c]orrect' jury instructions may nevertheless be confusing under some circumstances." Br. Opp. at 16. However, this Court has never found a due process violation arising from a jury instruction that correctly set forth state law, did not omit an element of the offense, did not create a presumption, and did not shift the burden of proof. Since this Court has not found a constitutional error in such a situation, the state court decision that the instructions did not violate due process cannot be an objectively unreasonable application of clearly established federal law. *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006).

Sarausad admits the "jury was instructed in the language of Washington's accomplice liability statute," *see* Br. Opp. at 2-3, and he declares he "is not contending that the instructions given in his case would, in and of themselves, give rise to a constitutional violation." Br. Opp. at 12. These concessions necessarily beg the question: how can a state court adjudication of a claim of instructional error be an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1)

where the Court has never found constitutional error in an instruction that did not omit an element, create a presumption, or shift the burden of proof?

The Ninth Circuit relied on this Court's decisions in *In re Winship*, 397 U.S. 358 (1970), *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Estelle v. McGuire*. 502 U.S. 62 (1991) to find the state court adjudication of the claim was an unreasonable application of clearly established federal law. Pet. App. 53a-55a. However, these decisions do not compel the conclusion reached by the Ninth Circuit. *Winship* held the "beyond a reasonable doubt" standard applies to juvenile adjudication proceedings that are the equivalent of a criminal proceeding. *Winship*, 397 U.S. at 359-68. *Sandstrom* held as an unconstitutional presumption an instruction that "the law presumes a person intends the ordinary consequences of his voluntary acts." *Sandstrom*, 442 U.S. at 512-26. And *Estelle* held an instruction, even though allegedly erroneous under California law, did not so infect the entire trial with unfairness as to violate due process. *Estelle*, 502 U.S. at 70-75. The holdings in these cases did not put the state courts on notice that the instructions given in Sarausad's trial violated due process. Pet. App. 100a-101a and 115a-116a (Bybee, J., dissenting); *see also Smith v. Horn*, 120 F.3d 400, 425 (3rd Cir. 1997) (Alito, J., dissenting) ("No Supreme Court case . . . has held that the Due Process Clause is violated whenever a state trial judge, in instructing the jury on the elements of state law, uses ambiguous language that prejudices the defendant."). The holdings in these cases do not compel the grant of habeas relief.

To avoid certiorari, Sarausad argues the Ninth Circuit tracked the requirements of *Estelle* when the court found a constitutional error and granted habeas relief notwithstanding the state court ruling that the instructions in his trial correctly set forth Washington law. Br. Opp. at 6. But *Estelle* involved the narrow issue of whether an instruction, allegedly erroneous under state law, "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72. Noting that the Court has narrowly defined the category of infractions that violate "fundamental fairness," the *Estelle* Court held that the allegedly erroneous instruction did not render Estelle's trial so fundamentally unfair so as to violate due process. *Id.* at 72-75. Since *Estelle* held that an allegedly erroneous instruction did not violate due process, it was not an objectively unreasonable application of *Estelle* for the Washington courts to conclude that instructions which correctly set forth state law also did not violate due process.

Sarausad also defends the grant of relief on the claim of jury instruction error by arguing the Ninth Circuit's decision was not based solely on the language of the instructions. Br. Opp. at 14. Sarausad cites *Penry v. Johnson*, 532 U.S. 782 (2001), *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Richardson v. Marsh*, 481 U.S. 200 (1987) for the principle that even a correct instruction may violate due process under certain circumstances. Br. Opp. at 14-16. But these cases do not clearly establish the principle that instructions on criminal liability, correct under state law, violate due process.

Penry and *Simmons* concerned the proper instructions for issues unique to capital trials. *Penry* held that instructions in a death penalty case must provide the jury with a vehicle to properly express its reasoned moral response to particular mitigation evidence presented by the defendant. *Penry*, 532 U.S. at 796-804. *Simmons* held that where the prosecution raises the issue of future dangerousness, and the defendant is ineligible for parole under state law, the defendant is entitled to an instruction specifically informing the jury of the ineligibility for parole. *Simmons*, 512 U.S. at 161-71. The holdings of *Penry* and *Simmons* involved specific rights granted to defendants in death penalty trials – the right to have the jury properly consider mitigating and aggravating evidence in fixing the punishment. The decisions do not compel the conclusion that instructions in a non-capital trial correctly setting forth state law violate due process.

Similarly, *Richardson v. Marsh* had nothing to do with the constitutional validity of instructions on accomplice liability under state law. *Richardson* involved whether the admission of a co-defendant's redacted sentence violated the Confrontation Clause. *Richardson*, 481 U.S. at 202. The portion of *Richardson* cited by Sarausad concerning a claim of prosecutor misconduct was merely a direction on remand for the Sixth Circuit to consider whether a prosecutor's comments "can serve as the basis for granting a writ of habeas corpus" in light of the defendant's failure to object. *Id.* at 211. The language was not a holding, and it did not clearly establish that an instruction, which is correct under state law, violates due process.

Sarausad argues that, even where the jury is correctly instructed in accordance with state law, "[f]ederal courts are free to consider whether a prosecutor's argument may have confused the jury." Br. Opp. at 14. While prosecutorial misconduct may violate due process, a claim of prosecutorial misconduct is distinct from the claim of instructional error granted by the Ninth Circuit in this case. Although the Ninth Circuit mentioned the prosecutor's argument as one of four factors in determining whether the jury may have misapplied the instructions, the circuit court did not grant relief on a claim of prosecutorial misconduct. Instead, the court granted relief based upon a claim that the instructions violated due process. Pet. App. 53a-79a. Sarausad's mischaracterization of the ruling does not alter the fact that the Ninth Circuit granted relief on instructional error when the instructions correctly set forth state law.

Furthermore, the assertion that the prosecutor's argument caused the jury to misapply the instructions is flawed for two additional reasons. First, the state courts ruled the prosecutor did not misstate Washington law. Pet. App. 192a and 209a-15a. The ruling of state law is binding on the federal courts. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Second, even if the prosecutor's arguments were misleading, the "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Boyde v. California*, 494 U.S. 370 (1990). The state court reasonably found no due process violation because the jury was correctly instructed as to accomplice liability. This state court decision was not objectively unreasonable.

In addition to the inter-circuit conflict identified in Waddington's petition, the Ninth Circuit's failure to give proper deference to the state court adjudication of the claim of instructional error also conflicts with the Seventh Circuit's decision in *Garth v. Davis*, 470 F.3d 702 (7th Cir. 2007). In *Garth*, the Indiana court ruled the jury was erroneously instructed on accomplice liability because the jury was not informed that it must find Garth had intent to kill. *Id.* at 709 and 711. Garth argued the instruction violated due process because it allowed the jury to convict him of attempted murder without a finding of the requisite *mens rea*. *Id.* at 709. Despite the erroneous instruction, and despite concern about the effect the instructions may have had, the Seventh Circuit ruled the state court could reasonably conclude there was no due process violation because the instructions as a whole adequately instructed the jury. *Id.* at 712. Unlike the Ninth Circuit, the Seventh Circuit determined the state court decision, even if erroneous, was not objectively unreasonable.

Finally, Sarausad suggests review is not appropriate because the Ninth Circuit's decision has limited effect. By rejecting the Washington Supreme Court's determination that the pattern instruction correctly informed the jury of accomplice liability, the Ninth Circuit has issued an opinion in direct conflict with the decision of the Washington Supreme Court. By declaring that the instruction adopted by the Washington Supreme Court is ambiguous, the opinion necessarily invites challenges to convictions under Washington's accomplice liability statute. The Court should grant the petition.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be reversed.

RESPECTFULLY SUBMITTED.

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February 20, 2008

JOINT APPENDIX

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(9)

Supreme Court, U.S.
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NO. 07-772

IN THE SUPREME COURT OF THE UNITED STATES

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari filed December 7, 2007

Certiorari Granted March 17, 2008

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

02-CV-02547-JCC

Cesar Sarausad, *petitioner*,

v.

Carol Porter, *respondent*.

12/20/2002 – [1] – Habeas corpus petition and legal memorandum filed

03/11/2003 – [6] – Answer to petition filed

03/11/2003 – [7] – State court record filed

04/22/2003 – [9] Reply by petitioner filed

05/30/2003 – [13] – Supplement to state court record filed

06/19/2003 – [14] – Second supplement to record filed

01/28/2004 [25] – Third supplement to record filed

10/12/2004 – [33] – Report and Recommendation to grant habeas corpus petition

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01/10/2005 – [41] – Judgment of U.S. District Court

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

05-35062

Cesar Sarausad, *appellee*,

v.

Carol Porter, *appellant*.

03/07/2007 – Opinion of Ninth Circuit, reversing in part, and affirming in part grant of habeas corpus petition

03/19/2007 – Petition for rehearing *en banc*

04/30/2007 – Response to petition for rehearing

09/10/2007 – Order of Ninth Circuit, denying petition for rehearing *en banc*; dissent from denial of rehearing *en banc*

10/01/2007 – Order staying issuance of the mandate

12/07/2007 – Petition for a writ of certiorari filed

02/05/2008 – Brief in opposition filed

03/17/2008 – Petition for a writ of certiorari granted

FILED

AUG 15 1994

[KING COUNTY SUPERIOR COURT]

[Caption Omitted In Printing]

AMENDED INFORMATION

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, of the crime of Murder in the First Degree, committed as follows:

That the defendant BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, together with others, in King County, Washington on or about March 23, 1994, with premeditated intent to cause the death of another person did cause the death of Melissa Ursula Fernandes, a human being, who died on or about March 24, 1994;

Contrary to RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

COUNT II

And in the alternative, I, Norm Maleng, Prosecuting Attorney aforesaid do accuse BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, of the crime of Murder in the Second Degree, committed as follows:

That the defendant BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, together with others, in King County, Washington on or about March 23, 1994, while committing and attempting to commit the crime of Assault in the Second Degree and Assault in the First Degree, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death on or about March 24, 1994, of Melissa Ursula Fernandes, a human being who was not a participant in the crime;

Contrary to RCW 9A.32.050(1)(b), and against the peace and dignity of the State of Washington.

COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, of the crime of Attempted Murder in the First Degree, based on a series of acts connected together with another crime charged herein, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, together with others, in King County, Washington on or about March 23, 1994, with premeditated intent to cause the death of another person did attempt to cause the death of Ryan Lam, a human being;

Contrary to RCW 9A.28.020 and 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

COUNT IV

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, of the crime of Attempted Murder in the First Degree, based on a series of acts connected together with another crime charged herein, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, in King County, Washington on or about March 23, 1994, with premeditated intent to cause the death of another person did attempt to cause the death of Tam Nguyen, a human being;

Contrary to RCW 9A.28.020 and 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

COUNT V

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, of the crime of Assault in the Second Degree, based on a series of acts connected together with another

crime charged herein, and which crimes were so closely connected in respect to time, place ad occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, in King County, Washington on or about March 23, 1994, did assault Brent Mason with a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants BRIAN KEITH RONQUILLO, JEROME MARK REYES, and CESAR FRASCO SARAUSAD II, and each of them, at said time of being armed with a deadly weapon, to-wit: a handgun, under the authority of RCW 9.94A.125.

NORM MALENG

Prosecuting Attorney

By:/s/ Lisa M. Marchese

LISA M. MARCHESE, WSBA #91002

Senior Deputy Prosecuting Attorney

[KING COUNTY SUPERIOR COURT]

EXCERPTS OF JURY INSTRUCTIONS

No. 6

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

No. 8

If you find that the defendant, with intent to assault a particular individual, fired a gun at that individual and by mistake, accident or inadvertence, the firing of the gun took effect upon a second individual, in the eyes of the law the intent to assault was transferred to the second individual as well; and the defendant is just as guilty as if he had originally intended to assault the second individual also.

No. 9

A person commits the crime of Murder in the First Degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

No. 12

To convict the defendant, Cesar Frasco Sarausad II of the crime of Murder in the First Degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant or his accomplice shot Melissa Ursula Fernandes;

(2) That the defendant or his accomplice acted with intent to cause the death of another person;

(3) That the intent to cause the death was premeditated;

(4) That Melissa Ursula Fernandes died as a result of the defendant or his accomplice's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as charged in count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as charged in count I.

No. 17

To convict the defendant, Cesar Frasco Sarausad of the crime of murder in the second degree (intentional), a lesser included offense of Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant, Cesar Frasco Sarausad, or an accomplice discharged a firearm;

(2) That defendant, Cesar Frasco Sarausad, or an accomplice acted with intent to cause the death of another person;

(3) That Melissa Ursula Fernandes died as a result of defendant, Cesar Frasco Sarausad's acts, or the acts of an accomplice; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 18

A person commits the crime of Murder in the Second Degree when he or she commits or attempts to commit assault in the first or second degree, and in the course of and in furtherance of such crime, or in immediate flight from such crime, he or she or another participant causes the death of a person other than one of the participants.

No. 19

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another and inflicts great bodily harm or assaults another with a firearm or deadly weapon, or any force or means likely to produce great bodily harm or death.

No. 20

A person commits the crime of Assault in the Second Degree when he or she assaults another with a deadly weapon.

No. 20A

An assault is an intentional shooting of another person that is harmful or offensive. A shooting is offensive, if the shooting would offend an ordinary person who is not unduly sensitive.

No. 31

To convict the defendant, Cesar Frasco Sarausad II, of the crime of Attempt to commit Murder in the First Degree, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant or his accomplice, did an act which was a substantial step toward the commission of Murder in the First Degree of Ryan Lam;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count III.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count III.

No. 34

To convict the defendant, Cesar Frasco Sarausad II, of the crime of Attempt to commit Murder in the First Degree, as charged in count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant or his accomplice, did an act which was a substantial step toward the commission of Murder in the First Degree of Tam Nguyen;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count IV.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count IV.

No. 38

To convict the defendant Cesar Frasco Saruasad II of the crime of Attempted Murder in the Second Degree, a lesser included offense of count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant or his accomplice, did an act which was a substantial step toward the commission of Murder in the Second Degree of Ryan Lam;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 41

To convict the defendant Cesar Frasco Sarausad II of the crime of Attempted Murder in the Second Degree, a lesser included offense of count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant or his accomplice, did an act which was a substantial step toward the commission of Murder in the Second Degree of Tam Nguyen;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 44

To convict the defendant Cesar Frasco Sarausad II of the crime of assault in the second degree, as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, the defendant or his accomplice assaulted Brent Mason with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as charged in count V.

On the other had, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as charged in count V.

No. 45

You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

No. 46

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

No. 47

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

No. 48

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

[KING COUNTY SUPERIOR COURT]

[Caption Omitted In Printing]

EXCERPTS OF DEFENDANT'S PROPOSED JURY INSTRUCTION

To convict the defendant Cesar Sarausad II of the crime of murder in the first degree, as alleged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 1994, defendant Sarausad aided and abetted the killing of Melissa Fernandez;

(2) That defendant Sarausad acted with intent to cause the death of Melissa Fernandez or some other person;

(3) That the intent to cause the death was premeditated;

(4) That Melissa Fernandez died as a result of defendant Sarausad's acts; and

(5) That the acts occurred in King County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 26.02

FILED

Oct 20 1994

[KING COUNTY SUPERIOR COURT]

[Caption Omitted In Printing]

DEFENDANT SARAUSAD'S
SECOND SUPPLEMENTAL
JURY INSTRUCTION

Respectfully submitted this 19th day of October, 1994.

/s/ Michael Nance

Michael Nance, WSBA #13933

Attorney for Defendant Sarausad

JURY INSTRUCTION ____

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and is ready to assist by his or her presence is aiding in the commission of the crime. However, in order to be an accomplice to another person's criminal act, one must associate oneself with the undertaking, participate in it with the desire to bring it about, and seek to make it succeed by one's actions.

The burden is on the state to prove beyond a reasonable doubt that a person has acted as an accomplice to another person's crime.

WPIC 10.51 (as modified)

State v. Robinson, 73 Wn. App. 851 (1994)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS VOLUME XVIII

OCTOBER 20, 1994

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[2935]

State have any exceptions to the Court's instructions?

MS. MARCHESE: None from the State, your Honor.

THE COURT: Mr. Austin, does Mr. Reyes have any exceptions to the Court's instructions?

MR. AUSTIN:

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Most importantly and most specifically, however, is the instruction having to do with the

[2936]

definition of accomplice. We proposed an additional paragraph on that instruction which confirms the responsibility of the State, the plaintiff, to prove beyond a reasonable doubt that, in fact, Mr. Reyes is an accomplice. I urge the Court that this situation was somewhat analogous to a self-defense instruction, though not the same. In the self-defense instruction, the burden to show that there wasn't self-defense is upon the State. This particular case

factually, our case, the case before this Court makes this additional paragraph, the inclusion on the accomplice definition particularly acute.

There has been extensive testimony concerning gang involvement. Mr. Reyes has not proposed a so-called gang instruction. But there has been a considerable discussion about gang involvement. It seems to be beyond dispute that no one is contending that Mr. Reyes was in any way a principal, the actual actor or the firer of the gun. He's charged here as an accomplice. The to convict instructions all refer to with respect to Mr. Reyes, the defendant, "or his accomplice." The accomplice liability is particularly acute in this case.

The general statement of the law and the comments in WPIC 10.51 indicate that it's not required

[2937]

generally to give a requirement of proving beyond a reasonable doubt that the person was an accomplice or not an accomplice. However, the comments to self-defense are illustrative. In a particular case, that seems to me that a jury should be advised that we don't simply accept the term accomplice because of a person's gang involvement. We don't accept the term accomplice just because the person was there.

I'm aware of the definition of accomplice. It seems to me in this particular case, with the posture of the evidence as it is, that it's extremely important that the jury in the accomplice definition be also told that it's a requirement that Mr. Reyes' status as an accomplice be proven beyond a reasonable doubt, and that was the proposal from Mr. Reyes. That, too, has

been denied by the Court informally in chambers. And I want to make sure that our record reflects that we offered a complete statement to that effect to be added to the proposed accomplice instruction and for the reasons I've indicated.

The allocation of gang involvement, I'm concerned that this jury may simply say, well, all right, you're a 23rd, they're responsible for anything any 23rd member does as an accomplice. This is all this testimony concerning behavior in the car. They

[2938]

were in the car, they must be guilty. I understand the instruction says mere presence is not enough. Something besides mere presence is required. But I think in this case, with the posture of this evidence it is particularly appropriate that the Court instruct the jury that the State must prove that Mr. Reyes was an accomplice in this matter before it convicts him of any of these charges.

I, therefore, except to the Court's anticipated refusal of that paragraph which Mr. Reyes has submitted. Thank you, your Honor.

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THE COURT:

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[2939]

As relates to the accomplice instructions, I believe the instructions that the Court has given are correct statements of the law. They've been approved by other cases. They are supported by the evidence, and they permit each party to argue his or

her theory of the case. The instruction of an accomplice will be given as I've indicated in the instructions you have before you. Your exceptions are noted and overruled for the record.

MR. AUSTIN: Thank you, your Honor. I believe that concludes Mr. Reyes' objections and exceptions to the proposed instructions.

THE COURT: Thank you. Mr. Nance? Does Mr. Sarausad have any exceptions or objections to the Court's instructions?

MR. NANCE: We do, your Honor. I would start with the exceptions. I think the best way is to go through the list --

THE COURT: You may.

MR. NANCE: -- one instruction at a time. Instructions 1 through 11 are acceptable. With respect

[2940]

to proposed instruction number 12, we respectfully object for a couple of reasons previously articulated, and I'll state for the record.

I believe that the reference in the to convict instruction on murder first degree where the jury's instructed that they may -- they have to find the element beyond a reasonable doubt that on or about the day in question the defendant or his accomplice shot Melissa Fernandes, in the first place, this includes Mr. Ronquillo, who I think the facts support as being the principal, not the accomplice. It widens the universe of possibly accomplices. It makes him an accomplice. It makes Mr. Sarausad a potential principal. And it sets up the possibility that the jury

might find that Mr. Ronquillo, as an accomplice, consorted with someone else and in some way, according to the instructions, it includes Mr. Sarausad, it attributes or incorporates his criminal act to Mr. Sarausad. That, in combination with the accomplice instruction, I think improperly wides the scope of what an accomplice truly is.

An accomplice and a principal are equally culpable under the law, but they are not the same thing. The principal is the primary actor. The accomplice is the aider and abettor. And I think

[2941]

this confuses it. This turns it around. And my proposal will be that the instruction read instead that, "On or about the 23rd day of March, 1994 the defendant or another person to whom he was an accomplice," which puts him in the proper place as the accomplice under the State's theory and not as something else, "That Mr. Sarausad or another person to whom he was an accomplice." That he was an accomplice under the State's theory to Mr. Ronquillo, one of them shot Ms. Fernandes. And I don't need to repeat for each element, but it's also referenced in prong number 2 and in prong number 4. And the same language should apply in all of those.

I think there was a real danger that the whole idea of accomplice is being broadened as an example, the jury could find that Mr. Ronquillo and Michael Vicencio had some kind of -- if he's the accomplice and Mr. Vicencio was someone he agrees to aid and abet, the instruction would permit a conviction of Mr. Sarausad. And I just don't think that appropriate.

THE COURT: Counsel, I think I'll address -- are you finished with that exception?

MR. NANCE: I think I am. Let me be sure.

(Pause in proceedings.)

MR. NANCE: Yes, I think that generally

[2942]

covers it.

THE COURT: Counsel, your objection's noted and overruled for the record. I think the instructions that you just referenced, instruction number 12 and the other to convict instructions which includes the same language are correct statements of the law. And accordingly, the exception is denied.

MR. NANCE: And sort of along the same lines, and I'll get to these in a moment, but I'll skip ahead for just a moment, and that's objecting to the failure to give the defendant's proposed instruction regarding accomplice definition, for the reasons that I think it clarifies what an accomplice actually is. And I realize the Court is reluctant to toy with the WPIC instruction. The WPIC instruction is fine in most cases. But this is a special case. And I think the Court should take extra care to be sure that the jury understands the limits of accomplice liability. In any event --

THE COURT: Counsel, again you have posed an accomplice instruction. And for some of the same reasons I articulated as relates to Mr. Reyes, the Court will give the instructions you have before you. Your exceptions are noted and overruled.

MR. NANCE: Thank you. With respect to

[2943]

number 17 proposed instruction regarding the lesser included of potential murder in the second degree, the same objections and what I've already argued.

THE COURT: Noted and overruled, counsel.

MR. NANCE: With respect to instructions 18 through 23 regarding murder in the second degree or felony murder, I guess we've already objected or joined in the objection of Mr. Savage with respect to the propriety of the charge at all. So in that sense, the instructions are improper. Just to note our objections in that vein.

THE COURT; Noted and overruled.

MR. NANCE: Proposed instruction number 27, same objections, reference to accomplice we think is overencompassing.

THE COURT: For the same reasons stated earlier, counsel, your objection's overruled.

MR. NANCE: Same objection with respect to number 31, Count III, attempt to murder first degree.

THE COURT: The same objection is overruled.

MR. NANCE: The same with respect to Count IV, number 34, same objection.

THE COURT: Noted and overruled.

MR. NANCE: Same with respect to number 38 as to the lesser of attempted murder second degree with

[2944]

respect to Count III.

THE COURT: Noted and overruled.

MR. NANCE: The same with respect to number 41. I think it's a lesser included attempted murder two respecting Count IV.

THE COURT: Noted and overruled.

MR NANCE: And finally number 44, same objection.

THE COURT: Noted and overruled. Thank you, counsel.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS VOLUME XIX

OCTOBER 21, 1994

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[3001]

THE COURT: Members of the jury, please give careful attention to Ms. Marchese, who will be presenting final argument on behalf of the State. Counsel?

MS. MARCHESE: On March 23rd, 1994 the defendant, Brian Ronquillo, his co-defendants, Cesar Sarausad and Jerome Reyes, had more respect for their street gang, the 23rd Street Diablos, than they did for human life. Respect for their gang meant so much that human lives were going to be sacrificed in order for them to regain the respect that they coveted so much that day.

Tam Nguyen and Ryan Lam nearly lost their lives so that these defendants could be respected in the eyes of rival gangs. They nearly lost their lives for doing nothing more than standing on a street corner after school waiting for their friend, Melissa, to be picked up. Brent Mason only had to

[3002]

take a shot in the leg so that these defendants could be respected, doing nothing more than standing outside his auto shop.

A 16-year-old woman, ladies and gentleman, had to pay the ultimate price for these defendants to be respected. Because of their coveted desire for respect, Melissa Fernandes didn't get to go on spring break, the spring break that she was planning with her boyfriend. Melissa Fernandes didn't get to finish school that year. Melissa Fernandes paid the ultimate price. She paid with her blood, with her life so that these three defendants could be respected.

Sitting before you to answer for their conduct on that day at Ballard High School is the instigator, Jerome Reyes, is the wheelman, Cesar Sarausad, is the shooter, Brian Ronquillo. Throughout this trial you've heard the defendants' lawyers refer to the shooting, this horrendous act of violence as immature, childish behavior, bravado, tough talk from a couple of boys' clubs. Not boys' clubs.

Let's deal with that right now, this whole notion, this whole nonsense that this was some immature act, some immature behavior by a couple of kids. They sit before you to answer for their conduct, not to have it excused because they are too

[3003]

young, they are too immature, they're just kids. Ladies and gentlemen, Melissa Fernandes was old enough to die. The defendant, Mr. Ronquillo, was old enough to pull the trigger that day. Cesar Sarausad was old enough to drive the car. And Jerome Reyes was old enough to be there ready to fight, ready to end, avenge his act of respect. The victim was old

enough to die. The other victims were old enough either to get shot or get shot at. These defendants are old enough to answer for their conduct. So let's put that age factor away from the outset. These defendants are here to answer for their conduct, not to have it excused based on sympathy, based on some notion that this was just childlike behavior from a couple of kids, because it was nothing of the kind.

In this trial, you've been exposed to a world perhaps that you don't deal with every day, a world of gangs, the world of the 23rd Street Diablos, the world of BSP's, a rival gang. Within that gang structure, respect and loyalty are two values that mean everything. "Don't disrespect my gang, don't chase Jerome Reyes out of Ballard, because if you do, you don't only have to answer to Jerome Reyes, you have to answer to his fellow gang members," Mr. Ronquillo, Mr. Sarausad. An affront to one is an

[3004]

affront to all.

We don't ask you to accept that world or like that world. We ask you only to understand it, because within the context of that world, only in the context of that world can a crime like this be understood. I remind you of that world because this morning I'm not going to repeat all the facts, all the things you've heard in this very long trial. But what I am going to do is talk to you about some of the legal principles, some of the instructions that the Court has given you on the law that applies in this case, because those particular instructions will be the most important in terms of guiding your deliberations through this case.

The first instruction I do want to talk about with everybody is what I call the reasonable doubt instruction. We've talked about it in the jury selection, you've heard it in your jurors handbook. This is an instruction that tells you essentially what reasonable doubt is. But what's even more important about this instruction is, it's telling you what reasonable doubt is not.

When you read this instruction, and you'll get it back in the jury room, it's interesting, you should count how many times the word "reason" or

[3005]

"reasonable" is used, no less than six times. A reasonable doubt is simply one for which a reason exists that would exist in the mind of a reasonable person, not a ridiculous person. And it's important to remind us at the outset what this means. It will guide your deliberations.

Applying the standard of proof beyond a reasonable doubt does not men that when you go back into the jury room you leave your common sense out here. Proof beyond a reasonable doubt does not mean proof to a mathematical certainty. It does not mean proof beyond a scintilla of a doubt. It doesn't mean that you give these defendants the benefit of the doubt. And it's not any old reason to doubt.

MR. SAVAGE: Your Honor, I object. That's precisely what the instruction means. The defendants get the benefit of the reasonable doubt—

THE COURT: The jury will rely upon the instruction. Proceed, counsel. It's argument.

MS. MARCHESE: Ladies and gentlemen, you do not give the defendants the benefit of the doubt --

MR. SAVAGE: Objection.

THE COURT: Overruled.

MS. MARCHESE: The standard is proof beyond a reasonable doubt. And the State's burden is not to

[3006]

answer all the questions you may have in the course of this trial. No crime could ever be proved with that degree of certainty. Ms. Noonan and I in this case have gladly assumed the burden of proving the elements and the elements only of the various crimes. You're going to hear that term heard a little bit this morning.

The elements are essentially those things that constitute the crimes. And the crimes charged in this case, as you know, are murder in the first degree for the senseless killing of Melissa Fernandes. There are two counts of attempted murder in the first degree. We know that the defendants were aiming at Ryan Lam and Tam Nguyen. And a fourth count of assault in the second degree for the shot that Brent Mason sustained to his leg in the course of the gunfire.

I'm going to talk to you this morning a little bit about the elements of each and everyone of those crimes. But when you recall the burden of proof beyond a reasonable doubt, you need to keep in mind that the State is required to prove the elements and the elements only of those various crimes. So keep that in mind.

If you have a doubt in this case, the first thing to ask yourself, is it reasonable, does it make

[3007]

sense, "Can I explain it to somebody else." And the next question you need to ask yourself is whether or not it relates to an element of proof. If it does not, it's of no consequence to your decision in this case. If it is, that's what we're going to talk about this morning a little bit.

There's another instruction that I want to talk to you about, too. There is another principle of law, a well-settled principle of law that applies in our state. It's called the doctrine of transferred intent. And what that means essentially in the short term is that nobody in the State of Washington is rewarded for being a bad shot. In other words, in this case the mere fact that the defendant, Mr. Ronquillo, missed Ryan Lam and Tam Nguyen and hit Melissa Fernandes instead, in the eyes of the law his intent to shoot Mr. Lam and Mr. Nguyen was transferred to Melissa Fernandes. Stated differently, if somebody is aiming at a person and really wants to shoot them and they miss and they hit an innocent bystander instead, in the eyes of the law you're just as guilty as if you were intending to hit the innocent victim.

Let me remind you of a couple of sentences from that instruction, because it's very important, especially in the context of two victims in this case,

[3008]

Brent Mason and Melissa Fernandes. If you find that the defendant, with intent to assault a particular individual or individuals, in this case, we

know it was clearly Mr. Lam and Mr. Nguyen, fired a gun at that individual or individuals, and by mistake, accident or inadvertence the firing of the gun took effect upon a second individual. In the eyes of the law the intent to assault, the intent to murder, the intent to kill was transferred to the second individual as well, in this case, Ms. Fernandes and Mr. Mason. And the defendants are just as guilty as if they had originally intended to assault, to shoot, to murder the second individuals.

Again, the law in the State of Washington says that the defendants are not rewarded for missing. The defendants are not going to be judged any less criminal for their conduct by the mere fact that they missed their intended targets. Melissa Fernandes' senseless and violent death will not go unpunished by the mere claim that she wasn't the intended target, that she wasn't the intended object of their insatiable quest for respect that afternoon.

We need to talk about another principle that applies that's important and should be applied to this case when we talked about the various crimes.

[3009]

There is no question from the evidence in this case that the defendant, Mr. Ronquillo, was the one firing the shots, the one who actually caused the acts of violence or actually caused the damage. I should say. Under the laws of the State of Washington, people who help commit crimes, people who set the wheels in motion, people who assist in the commission of crimes are called accomplices or aiders and abettors, as we more commonly know them to be. And in the eyes of the law, you are no less guilty

because you drive the getaway car or because you solicit a crime to occur. You're no less guilty for helping than you are for pulling the trigger.

The defendants, Mr. Sarausad and Mr. Reyes, are classic accomplices. And let's talk a little bit about the law of accomplice liability as it exists in our state. You're going to have two instructions that talk about accomplice liability. There's one instruction toward the end, it's number 45 -- and don't worry about these numbers, you'll get your own set back in the jury room -- but the instruction essentially says that you are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the

[3010]

conduct of another when he is an accomplice. And there's another instruction right behind it which breaks down all the ways somebody can assist or aid in the commission of a crime, solicit, command, encourage, request another person to commit a crime, aid or agreed to aid, presence at the time the crime is occurring or readiness to assist.

In fact, accomplice liability is such that a person can be an accomplice to a crime whether they're present or not when the crime occurs. I'll give you a good example. The defendant, Mr. Reyes, by setting the wheels in motion, by simply calling his friends, getting them together, saying, "Let's go avenge this problem," he's an accomplice. You call somebody up on the phone and you tell them go do something, "Go commit this crime and report back to me," and the person does it, you are an accomplice.

If you wait outside the bank while somebody's robbing it and all you're doing is driving, you are an accomplice.

The law of accomplice liability is such that the person who assists doesn't even have to have the same intentions as the actual person who is committing the crime. You have to be present, you have to be ready to assist. And you have to know that your assistance is causing the crime to unfold.

[3011]

Let me give you a good example of accomplice liability. A friend comes up to you and says, "Hold this person's arms while I hit him." You say, "Okay, I don't like that person, anyway." You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, "Well, I only intended this much damage to happen." Your presence, your readiness to assist caused the crime to occur and you are an accomplice. The law in the State of Washington says, if you're in for a dime, you're in for a dollar. If you're there or even if you're not there and you're helping in some fashion to bring about this crime, you are just as guilty.

In this particular case, the defendant, Mr. Reyes, brought these people together, and not once, but two trips to Ballard High School to regain the respect that he lost, his presence in the car, his readiness to assist. And we're going to talk a little bit about Mr. Reyes and his knowledge. Let me give you a good example of Mr. Reyes' knowledge that criminal activity was going to happen. And this is a

good example of how common sense should come into play in this case.

On the stand, Mr. Reyes said, "I know the BSP's have guns. I thought they were firing at me."

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Whether that was true or not, I submit to you, ladies and gentlemen, it showed his knowledge and it showed how ludicrous the crime was, that, "We were going down there with our fists to fight a gang that we know carries guns." From his statement, ladies and gentlemen, he showed you exactly what he knew, exactly what he knew was going to happen. That's just one example of Mr. Reyes and his involvement.

But he essentially, ladies and gentlemen, was the instigator, the person who set the wheels in motion, the person who lost respect, the person who asked his fellow gang members to help him get it back.

The defendant, Mr. Sarausad, classic accomplice in this case. He's the driver, he's the wheelman. He allowed Mr. Ronquillo to fire those shots And you recall, witness after witness after witness described how the defendant, Mr. Sarausad, drove that car, ladies and gentlemen, fast at first. And, in fact, toward the end, even Mr. Cooke described the swooping motion, which is what each and every witness described in different ways in this case. The car slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up. Mr. Sarausad allowed this crime to occur by driving in the fashion

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he did alone.

Both these cases, ladies and gentlemen, the defendants, Mr. Sarausad and Mr. Reyes, they were both present and they were certainly ready to assist. And I remind you, too, what you heard not only from Detective Rusness, the gang expert in this case, but from 23rd member after 23rd member who told you that an affront to one is an affront to all, "When you disrespect me you disrespect my gang." And that is so powerful that, "I will fight you even though I don't even know you. I will fight you," simply for wearing the colors of another gang. "I will fight you even though I don't have a problem with you." And, "I will fight you to avenge an act of disrespect done to one of my own." Presence, readiness to assist.

They were all there that day, especially these three, ready to back each other up in whatever happened. In for a dime, they were in for a dollar and they were sticking together.

And ladies and gentlemen, actions, especially in this case, actions speak so much louder than any words, actions speak louder than words. You know, the best indication of what was going on just before the shooting is gleaned by what happened immediately after the fact. There was no hesitation, there was

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no stopping the car. There was no attempt for Mr. Sarausad to swerve his car out of the way so that innocent people wouldn't get shot. That was like clockwork. There was no hesitation. He sped off.

There was no thought to getting rid of the shell casings. Nothing said to the defendant, Mr. Ronquillo, because there was nothing to say. Nobody asked him why he did it. They all knew. They all knew what they were there for. An affront to one is an affront to all. And these three defendants, ladies and gentlemen, are the ones who were responsible, and that's why they're sitting in those chairs.

I want to talk to you in my remaining few minutes about the crimes charged and the elements as they relate to those crimes. The first crime I'm going to talk about is murder in the first degree. All three defendants have been charged with murder in the first degree. There's an instruction that breaks out essentially like this, paragraph one, what the elements of murder in the first degree are. There is no question that on the first element of proof that on the 23rd day of March, 1994 the defendant shot Melissa Ursula Fernandes. That is an element of proof that has been proved beyond a reasonable doubt in this case. There is no question that the defendant,

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Mr. Ronquillo, was the one emptying his magazine that day. That the defendant acted with intent to cause the death of another person. That's another element of proof. There is no question in this case, the facts gleaned by the evidence when they're parked up the street, when everybody stated, "Is that them, that's them, those are the people who were involved in the first dispute," referring essentially to Tam Nguyen and Ryan Lam. We know that Tam Nguyen was there for a very brief period during the first altercation. We know Ryan Lam was there

during the entire altercation, which corroborates they recognized them when they said, "There they are, let's go."

The defendant acted with intent to cause the death of another person. He wasn't firing warning shots in the air. He wasn't firing shots into the ground. He wasn't simply firing shots to scare. He was firing shots to kill.

You'll get these photographs back in the jury room that Mr. Grubb testified to that showed you the trajectories in this case. These red line trajectories indicate that this defendant was aiming. And it's very interesting, when you get back in the jury room you can see where these lines intersect, indicates what the target was, the target being Ryan Lam and

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Tam Nguyen, the exact location where they were standing when these shots rung out.

Mr. Grubb also told you there is a five percent approximatation that either puts the car in one place or another place on 67th Street. But what Mr. Grubb told you does not change in the analysis, no matter how you look at this, that these shots all came through this crime scene on a horizontal plane, a horizontal plane, ladies and gentlemen, on a horizontal plane. They weren't being fired up here, they weren't being fired down here (indicating). They were deliberate shots, shots fired by the defendant, Mr. Ronquillo, shots that were aimed to kill. Shots that scared Ryan Lam so bad, he demonstrated how he grabbed his book bag to save his own life. That Tam Nguyen dropped to the ground in a ball to avoid the gunfire to save his own

life. Shots that Melissa Fernandes was not so lucky to avoid. Shots that were fired and aimed to kill. There is no question that the defendant was acting with intent to cause the death of another.

The other element of proof, that Melissa Fernandes died as a result of the defendant's actions. That's clear from the medical examiner's testimony, that's clear from all the evidence in this case, that

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the intent to cause the death was premeditated.

Let's talk a little bit about premeditation. And I've blown up this instruction, and I want to refer you to it. I want to talk a little bit about it. Premeditation is not to be confused with conspiracy, details of planning, weeks of planning, months of planning. That is not premeditation. This is not about a conspiracy. This not about planning, preparation for hours and hours on end. Premeditation, under the eyes of the laws of the State of Washington, simply requires one thing. As the instruction states, more than a moment in time in which the design to kill is deliberately formed. Right here, "Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed." More than a moment in time in which the design to kill is deliberately formed.

That's not conspiracy. That's not weeks of planning, days of planning, hours of planning. That doesn't mean they had to start planning this horrible crime back at Gaurav Nayar's. More than a moment in time in which the design to kill is deliberately formed.

If we assume for the moment that the defendants

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are truthful, defendants, Mr. Reyes and Mr. Sarausad, were truthful, that the idea was hatched to go back to Ballard High School in the car while they left Gaurav's, that's sufficient. Assume that even the idea was hatched as late as when they pulled over to the corner when they stopped the cars on 14th, that is sufficient. More than a moment in time in which the design to kill is deliberately formed.

Let's talk a little bit about some of the evidence of premeditation in this case. This was a case about respect. I told you that at the outset. It was apparent after the first confrontation that fists weren't going to work to regain respect. As Arsalan Alavi told you, they laughed at them, they called them weak, they called them nothing. They disrespected their gang. Fists weren't going to regain respect. A gun was, in their eyes.

They returned, they went to Ballard that day not once, but twice. And the second time they went there it was after the fists didn't work, the pushing didn't work, the flashing of the signs, the violent altercation didn't work. And let's not mince words here about what was going on. The defendants and their fellow gang members, the defendant, Mr. Sarausad, the defendant Mr. Reyes, and yes, the other 23rd's

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that testified in this case, would have you to believe just a little bit of pushing and shoving, no big deal, just childish, it was no big deal to anybody. Well, that claim, ladies and gentlemen, is belied by their own actions and by the observations of the people in the neighborhood who had nothing to do with this.

Emily Hiber, who ran a day care up the street, was so concerned, you heard her testify, you heard her on the 911 tape. You heard her on the 911 tape. It was violent, it was so upsetting to her she picked up the phone and called the police. Witnesses at Ballard saw a gun. The evidence shows it's very likely they had a gun on that first trip down there, but didn't have too much of an opportunity to use it because the police came. Shoving wasn't going to regain their respect, a gun was. And that's why they went back for a second trip. Mr. Ronquillo got that gun from Michael Vicencio.

Let's talk about more than a moment in time in which the design to kill was deliberately formed. It's very telling in his testimony, Mr. Vicencio said the clip was out of the gun when he gave it to the defendant, Mr. Ronquillo. We know what happened to the real gun. The real gun was destroyed by fellow gang members after the crime had occurred.

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Witness after witness testified this MAC-12 as essentially identical to the murder weapon that was used by the defendant, Mr. Ronquillo, in this case.

When he got this gun from Michael Vicencio, the clip was out of the gun. He had to load it, he had to put the clip in -- and incidentally, there are no bullets in this, this has been disarmed -- he had to

load the clip (demonstrating). We know how it operates. Slide the clip back before it was ready for firing. A clicking noise that Lev Arakelyan heard.

Ladies and gentlemen, he tried to minimize it when he testified maybe it was something else, I don't know. Well, it's kind of a hard noise to confuse in a garage where people are supposedly drinking soda pop and dancing. It's kind of a hard noise to confuse with something else, especially when you've heard it before. And who did he hear it from? The defendant, Mr. Ronquillo, and the defendant, Mr. Reyes.

Mr. Ronquillo, with a bandana over his face while Mr. Sarausad drove slow enough for him to fire not one shot, not two shots, but to essentially empty this magazine. We know this magazine holds ten. We accounted for six shell casings at the scene. Two

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more destroyed after they were thrown out of Mr. Sarausad's car by the defendant, his henchman. We've accounted for eight shots by the shell casings alone. The witnesses heard ten. Mr. Sarausad himself begrudgingly said he heard ten shots. He emptied this gun not one time, but ten times. Shots fired while he was aiming as the trajectory photographs show you.

More than a moment in time in which the design to kill is deliberately formed. And if you find, ladies and gentlemen, that the defendants, Mr. Reyes, Mr. Sarausad, assisted in the commission of this crime, they are just as guilty as if they would have pulled the trigger themselves. He clearly was intending with premeditated intent with the

bandana over his face, in the backdrop of this violent gang dispute, intending to take out Ryan Lam and Tam Nguyen. And his premeditated intent to kill them is transferred to Melissa Fernandes. The evidence shows beyond a reasonable doubt this defendant is guilty and that these defendants helped. And for their assistance, they are just as guilty as if they would have pulled the trigger themselves.

And incidentally, this dispute, this shooting occurred not only in the same area where the first fight occurred that day, but in the same area where

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Jerome Reyes was run off just days before. It's no coincidence, ladies and gentlemen, that that was the area they went to. That was the area they went to because that was the area where the BSP's hung out. That was the area where they were going to regain their respect.

You remember in the car Michael Marckx, Luke Gosho told us begrudgingly, didn't want to tell us, begrudgingly acknowledged the discussion about capping, the discussion about shooting. Ladies and Gentlemen, it was discussed. They all knew what was going on. Who wanted to go back to Ballard? Defendant, Mr. Sarausad, said it was Brian and Jerome. Defendant, Mr. Reyes, said it was Brian and Cesar. These three were the ones that wanted to go back. More than a moment in time in which the design to kill was deliberately formed.

There are two counts of attempted murder in the first degree, as I've told you, for Ryan Lam and Tam Nguyen. The only difference between attempted murder and murder one in this case,

attempted murder in the first degree and murder is that lucky for Ryan Lam and Tam Nguyen they weren't killed. In fact, lucky for a lot of people who were out there under close-range circumstances that they were not shot or

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killed.

Attempted murder in the first degree essentially only requires that a person take an act which is a substantial step toward the commission of that crime. Substantial step is defined for you in the instructions. It's more than mere preparation to commit a crime.

I submit to you, ladies and gentlemen, these defendants, Brian Ronquillo, took a substantial step to kill with premeditated intent Ryan Lam and Tam Nguyen when he aimed the gun and he fired it, not once, not twice, but several times. If we want to talk about premeditated intent, this gun was not fired automatic. There is no evidence of that, based on what the witnesses heard, not based on what Mike Grubb saw in terms of the trajectories, and not based on what Terry franklin saw. This trigger, three-and-a-half, four-pound trigger, was pulled eight to ten times by this defendant, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (demonstrating), pulled while he was aiming, pulled while he was trying to hit targets. Not only premeditated, but a substantial step in his effort to kill Tam Nguyen and Ryan Lam.

The last crime charged in this case, assault in the second degree, has to do with Brent Mason and

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likewise with Melissa Fernandes. The law says that it is still criminal to shoot Brent Mason in the leg. You're not going to be rewarded for being a bad shot or missing your intended target simply because you hit an innocent victim. The doctrine of transferred intent applies to Brent Mason as well who was likely hit by a ricochet shot in the leg as he was doing nothing more than walking out of his auto shop class. The defendant's intent to shoot intended victims took effect on the second individual. This individual was Brent Mason. An assault is simply an intentional shooting of another, in this case, the shooting of Brent Mason. The intent to assault is transferred to Brent Mason. And that's why this crime for shooting him in the leg is not going to go unpunished simply because they missed their intended target.

As I told you at the beginning, ladies and gentlemen, this is a case about respect, respect that means so much to them they don't care about human life. People have to go down so that the 23rd's can be respected, so be it. "We've gotta shoot a gun to regain our power," to be perceived as being tough, and Melissa Fernandes has to die, so be it. Brent Mason has to take a shot in the leg, so be it. Tam Nguyen and Ryan Lam have to duck to the ground to

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avoid gunfire, so be it. "They don't disrespect us because an affront to one is an affront to all."

Had the defendant, Brian Ronquillo, not fired those shots that day, Ms. Fernandes would still be alive. The others wouldn't have been assaulted by the gunfire. Had the defendant, Cesar Saruasad, not

driven his car, the defendant, Brian Ronquillo, never would have been allowed to fire not only the shots, but come so very close to hitting his intended target, hitting ultimately Melissa Fernandes. Had the defendant, Jerome Reyes, not been disrespected two days beforehand, had he not gone to the Pink Pantry that day, told them, "Hey, guess what happened to me," had he not threatened the BSP's before he left by saying, "I'm coming back with my gang, you can't do this to me," none of this would have happened, none of this would have happened.

These defendants are here not to be excused for their conduct, but to be held accountable for their senseless disregard of human life. I ask you, ladies and gentlemen, to return the verdicts in this case that fairness dictate, that justice demands. And those are verdicts of guilty as to all defendants for Count 1, murder in the first degree, guilty of attempted murder in the first degree for the shooting,

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the attempted murders of Ryan Lam and Tam Nguyen. And guilty as to all defendants for assault in the second degree of shooting Brent Mason in the leg.

Thank you.

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THE COURT: Please be seated. Members of the jury, please give careful attention at this time to Mr. Austin, who will present final argument on behalf of Mr. Reyes. Counsel?

MR. AUSTIN: May it please the Court, counsel, members of the jury: Sometimes in advocacy and zeal one or other counsel will misstate something that another attorney has said about something to the evidence. Even the Judge has cautioned you to look to your instructions regardless of what's been represented to you. What I'm referring to is the allegation just made by the State that somehow I

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diminished the importance of this matter. You have not herd in any of my comments or any of my presentations on behalf of my client, Jerome Reyes, any lessening of the horrible outrage that this young girl suffered.

Since the government's going to have the last opportunity after all of these closing arguments to rebut, I ask you to be cautious and listen carefully to what I say, look carefully to what the evidence actually is and pay attention to what the instructions are.

I told you in the opening statement that the horror of this event is going to reach into your vitals. You will have a visceral reaction to it. And it's altogether appropriate that you do so. This was and is a senseless outrage and a horror suffered by this young girl. And in some ways, it's grotesque that we attempt to apply reason to a resolution of what happened on that afternoon of the 23rd of March. But, in fact, that is what your responsibility is. That is what you've sworn to do as jurors, and that's what this courtroom proceeding is about.

There are two things that I want to cover with you this morning. And I hope that nothing I'm going to say to you you have not already heard or do not

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already know. It's my job to emphasize it and bring it up to your careful attention. I intend to do that. If at any time you hear me appealing to your sympathy or your prejudice, I invite you to disregard that entirely. And I urge you to disregard that kind of appeal from anybody else in this case entirely.

I direct your attention to the end of the first instruction, which I submit says just what I've told you just now. You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence you. No amount of sympathy and no amount of prejudice can change the facts.

The first of the two things I want to do is to talk to you about your instructions. There are 54 of them plus a number of verdict forms. The second thing I want to do is review with you some of the facts of the evidence that's been presented in this court and that hasn't been presented in this court. Thirdly, I hope to tie the two together for you as an advocate for Jerome Reyes.

First of all, as to the instructions. There are 54 of them. Judge Jordan has told you that the order in which the instructions are given, their

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relative length, size, their number, add no particular significance, so you're supposed to consider your instructions as a whole. Make sure that you understand them and apply them, because the beginning of that first instruction says, "It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the Court regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts, and in this way decide the case."

Now, I think sometimes it helps when you're getting a complicated set of instructions like this if you can break them down into some reasonable fashion. There is no table of contents on this. What I'm about to tell you is a suggestion for the way you may break them down into some comprehensible form to make sure that you properly understand all the instructions and can apply them so you can carry out your duties to apply this law, to accept this law. There is no magic language here and there is no special arcane phraseology or anything like that. But generally, if you break these into the categories of one's housekeeping instructions, that tells you what your responsibilities are. And I cited you a

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couple of paragraphs from instruction number 1. It tells you what your duty is and that you're officers of the court.

If it helps you, one group is your housekeeping instruction, tells you what you're supposed to do and how you're supposed to proceed. There's another group, again not listed this way, I offer this just for

your help, that defines terms that are used. All of us talk about burglaries and robberies and circumstantial evidence and premeditation, deliberation and all that business, and we all argue intensely about it. But when you get to court, they have specific meaning. And Judge Jordan has defined them to you. And that second group after your housekeeping instructions is a definitional set. You'll find a set of instructions, some as short as one or two paragraphs or a sentence that will define terms for you. So besides the housekeeping instructions, the definitional terms.

The third group will tell you that the plaintiff has the burden of proof and what they must prove, what the elements of the offense are and what's required from the State, regardless of the government's characterization of benefit of the doubt and so on. That particular issue is addressed in these instructions, and I'll cover that with you in

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a moment. And Judge Jordan has reminded you that you are bound by these instructions regardless of representations by me or the government or anybody else in this case. You should make your decision independently based upon what you think the facts are and what you think the law is.

So if it helps you, housekeeping instructions, definition of terms and the burden of proof. And an example of the housekeeping instruction, and there are a few, is this big boilerplate one at the beginning which I've just cited the first and last paragraphs from. "You are officers of the court and must decide the case without sympathy or prejudice" is the

concluding paragraph. Your duty is to determine the facts. I told you during opening statement that lawyers' remarks, statements and arguments are not themselves evidence, but are intended to help you. And I hope my remarks this morning will do that, because the first paragraph of page 2 says precisely that, "Counsel's remarks, statements and arguments are intended to help you understand the evidence and the law. They are not evidence, however, and you should disregard any remark, statement or argument which is not supported by the evidence or the law given to you by the Court."

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Your concluding instruction tells you what your responsibility as a juror is. There are a vast number of verdict forms, and we'll get to those. Instruction number 50, again if it helps, a housekeeping instruction, "Jurors have a duty to consult with one another and to deliberate with a view to reaching a unanimous verdict if it can be done without violence to individual judgment. Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson to act as chairman. It's his or her duty to see that the discussion is carried on in a sensible and orderly fashion." Common sense, you're not required to check your common sense at the door when you come into court. As I say, if it helps you when you're looking at this mass of instructions -- and I remind you that Judge Jordan said you will each have your own copy to take back with you. If it helps you when you're looking through here to say, "Okay, there's a housekeeping instruction, definitional instruction, a substantial step, what is it." Well, it's conduct which

strongly indicates a criminal purpose and which is more than mere preparation. "A person knows or acts knowingly over the knowledge when he or she's aware of a fact, facts or circumstances or result prescribed

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by law as being a crime." Definitional instruction. I'm not going to reread the instructions to you, as fascinating as that might be.

I mention this because it's quite often that after I've cited a few things to bring something to your attention, when I'm finished and there's a rebuttal, they're quick to point out that I'm trying to mislead you in some way by citing only parts of the instructions. I urge you, as Judge Jordan has instructed you, to carefully consider your instructions as a whole, not giving any particular significance to the order in which they come or their individual length. You are to consider them as a whole. And I urge that you consider them as a whole.

A couple of examples of the housekeeping and definitional instructions. There are two instructions that I submit on behalf of Mr. Reyes are particularly acute in this case. And that's 2 and 46, instruction number 2 and instruction number 46. Number 2, which is in that third category of instructions that I've suggested to you, the burden of proof and the requirement of what the State has to do in a criminal case says. "The defendant has entered a plea of not guilty which puts in issue every element of the crime charged." In spite of

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some claims and allegations about benefits of the doubt, second paragraph indicates that a defendant is presumed innocent. And it doesn't say that it's the presumption of innocence if it's a minor crime or a presumption of innocence if it's a serious crime or that it's a moving scale in a horrible and outrageous crime such as this. That is a constant scale. A defendant is presumed innocent. And this presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

"A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." That's not fair. Accuse somebody of something, you should have to prove everything, evidence or lack of evidence. "A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence."

You will not find anywhere in these instructions that this is a floating scale depending on the nature of the crime charged. This is a constant for an impartial unsympathetic unprejudiced officer of the court. I urge your attention to

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instruction number 46 as the second one of the particularly acute instructions on behalf of Mr. Reyes. "A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the

commission of the crime he or she either solicits, commands, encourages or requests another person to commit the crime, or aids or agrees to aid another person in planning or committing the crime. The word aid means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice."

Please read your instructions in their entirety. And I'll come back to that and some other instructions in a moment. You're going to have your individual packet of instructions. If it helps, when you're reading them, you get them in some kind of systematic order, I suggest the three categories I've outlines, housekeeping, organize yourselves and how your deliberations are going to be conducted. There's a couple of instructions to that effect. You'll want to find the definition of terms as it's meant. They're scattered throughout here, definitions of terms. Thirdly, what is the responsibility, what are the burdens of proof, what has to be proven.

I've cited you the presumption of innocence. They are commonly called the to convict and there are a number of them, because Mr. Reyes is charged with premeditated and deliberate murder of Melissa Fernandes. He's charged with the deliberate assault on Brent Mason. He's charged in five counts, and you'll have to weigh each of those carefully. Make

sure that you understand your instructions so that you can apply them properly.

I've suggested to you a number of representations which you must decide for yourselves are true or not. And they begin incidentally with the last exhibit referred to by the government and also by its last witness. They're not photographs in the first place. They are reconstructions to support a hypothesis. I'm referring to Exhibits 50, 49, 52 and 51, which are apparent slides of a computer

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representation. That should settle it. Computers can't make mistakes, can they? We can see the little cars. Well, I think most of you are familiar with the phrase, garbage in, garbage out I want you to please remember Mr. Grubb's testimony that there was no way that he can determine the order that the shots were fired in, in spite of all the red lines here. He can tell you that they are probably fired in a horizontal posture rather than firing up and over. But he also described the trajectory of the typical bullet. He could not tell you ranges with any degree of specificity, can't tell you the order of shots.

But interestingly enough, and as I told you, watch out for zeal and advocacy governments do it, individuals do it, heck, I even do it sometimes – but there is plainly suggested to you that there was an individual shot fired directly into Melissa Fernandes. Please recall Mr. Grubb's testimony. There isn't any way you can make such a determination any more than medical examiners can. All you can do in that kind of situation is determine the path of the

projectile in the body, and even that, the internal fragmentation of the projectile and bouncing around in the skull in this case. If the person is standing face-on, you'd expect a shot to be in the

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Face area. If you're turned it would be somewhere in the back. If they're ducking, the angle of the shot may be affected. We don't know. That does not mean no shot was fired and it does not mean that Melissa Fernandes was not shot with the bullet entering to the back left side of her head moving slightly up to the right front. That's a fact. Everything else is conjecture.

Guns are wonderful in court. I told you in opening statement that this is about as nasty a little piece of hardware that you'll ever encounter. Regardless of your affection for guns or your simple need to be safe, they are always potentially deadly. Some of you were raised in an era where you knew there's no such things as an unloaded gun. The important thing about Exhibit No. 23, this gun – you're invited to experiment and play with it back there, it'll be marked safe, you'll have the safety lever here, you may even disassemble the thing. The point that I want to urge to you is that this is not the gun used. It's characterized as identical by the government. The similarity and identical may be for you to decide. I believe the testimony and the evidence was that this is similar.

You'll recall the testimony of Mr. Franklin.

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That these guns have been made over the course of years and assembled by various manufacturers at various locations from various assemblages of parts. They're all subject to different kinds of wear and tear depending upon their age. They have some slightly different finishes. Some of the guns were made with open bolts, some were made with closed bolts.

You'll note from Mr. Franklin's testimony that in an open bolt gun all you have to do is insert the magazine and it's ready to fire. The wear and tear on a magazine slipping in and out of its receptacle, all vagaries we don't know about. This is not the gun. Play with it as you will. Click it and stick it in. You'll see it's an empty magazine, not full. Do what you want. But I submit that like the photographs, it is entirely conjecture, entire conjecture.

But it does not prove that Melissa Fernandes was not shot with a .380 semiautomatic round on the early afternoon of March 23rd, 1994, which turns out to be a Wednesday, not a Thursday as I referred to. It did happen. But remember these are surmise and conjecture, not proof of what happened.

You have a series of recovered cartridges in

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the envelopes. And you have a series of photographs beginning with what I described at the beginning as this lovely young woman. And as I told you at the beginning of these remarks, there is no way to conceal the sadness or the pain of this incident. I'm asking you to set it aside in the weighing of this case. And the pathetic autopsy photograph of her skull shaven. You'll have a series of photographs and a diagram. Exhibit No. 1. You'll be able to match up

the photographs – I'm just showing you what these are, I realize you're not seeing this far away. You'll have an entire series of photographs of the scene which you can match up based upon the diagrams. You'll see, for example, in Exhibit No. 18 some marks, and here on Exhibit No. 1 you'll see the relative positions that different witnesses have placed these. You'll see photographs alongside the school here with the yellow painted curb and so on. It's for you in your deliberations to look at those photographs and get a sense of the scene.

I think we have another diagram here. You'll see photographs of the brown car. And I remind you that there were to carloads going to the school at Ballard that day, the earlier one at approximately noon had two cars, the red car of Cesar Sarausad

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followed by the black car of Gaurav Nayar. The second trip a little over an hour later, again the red car in the lead, and this is Mike Vicencio, or Lolo's car. You'll see Exhibit No. 19 which indicates bullet holes. You'll recall the testimony of Mr. Grubb, again in reconstructing the possible trajectories on that, acknowledging the horizontal nature of the shots, but the other axes were subject to some vagaries. You'll have a recovery of casings. And again, to remind you, the spent casings ejected from the .380, Mr. Franklin indicated that generally the ejection is up and forward to the right. So that a firing would mean that the spent round -- and I think some of you have had some experience with that, there is a click and out it comes spinning to the right and forward from the gun

More big scale pictures of the scene, 67th going away in this direction. And here you'll have some more photographs of the gun and the bullets. And you'll recall the explanation of Mr. Franklin. The Sarausad car is the red one, four doors. You can see the position of the headrests. You will remember the testimony of Detective Maning that the automobile is in the same condition. There hasn't been any particular change. That would include the jacket,

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the position of the back seat, the hump and so on.

With respect to Jerome Reyes, you will remember that he was sitting behind the driver on the left rear side of the red car. This photograph, the lower left-hand photograph, you'll be able to see across where Mr. Ronquillo was sitting in the right front passenger seat back to the back corner of the car where Jerome Reyes was sitting. The lower right photograph where the blue coat is shown, you'll see the approximate position where Jerome Reyes was sitting in the car.

Argument is intended to emphasize particular points that we think are appropriate to our case. If you've made up your mind, I doubt that the most skilled argument in the world can change your mind. You're asked to come in here impartially and listen carefully to the evidence. What's been presented to you is, since something horrible happened, there must have been a step-by-step deliberate careful move toward it. That may be. But, in fact, there is not evidence to that effect, and your common sense suggests to you that a bunch of people sitting around

the Pink Pantry, goofing off, talking about various things may or may not have had any particular4 significance on that day when somebody said Jerome

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Reyes went over to see his girlfriend and some BSP's ran him off. The State is saying that that set in motion, in effect, a deliberate, calculated chain of events. Somehow, Jerome Reyes jumped up, "You've got to revenge me, this is terrible, this is an affront, this is a slight, we've got to get over there." You know that's not what happened.

Some of you may have goofed around when you were a kid. And when I use that phrase, I do not -- I at least hope you'll remember this afternoon or whenever that I am not characterizing this as a bunch of kindergarten kids. I'm trying to appeal to your common sense. They're eating junk food, shooting the breeze. That's what the evidence shows. Because its own witnesses, paid witnesses, witnesses with a considerable amount at stake to get this pay all indicate there wasn't any big deal about going over to Ballard or anything like that. And in the zeal to make some sense out of what remains a senseless shooting, a senseless kidding, there's sometimes an effort to glom onto something and say, okay, this somehow confirms all this. You'd expect at least one witness, even one paid witness to say, "Yeah, he was saying we gotta get over there." It was nothing like that. Did any witness -- is there any evidence in

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this case? In the closing arguments, the government says, "Guess what, I got run off by BSP's and I

threatened them I'd be back." Is there any evidence of that?

There could have been, I suppose, if it had happened, because you've got all these kids at Ballard High School and they could've said, "Yeah, yeah, that's what he shouted as we ran him off." That is an absolute unsupported allegation based upon surmise and conjecture, similar to this and this (indicating).

However true or false, we take it as a fact that Jerome Reyes had some kind of an encounter at Ballard High School within a couple of days prior to the shooting. But its characterization is what I'm concerned about. Was this Arnold Schwarzenegger, "I'll be back with my guys"? Is there any evidence to that effect? What kid hasn't done this? And some kids do have a violent reaction to it and some kids shake it off, and some kids are embarrassed about it and don't say anything. Something was said, but you're asked without any evidence to support it, to conclude that Jerome Reyes was so outraged somehow something had to be done. Well, my people, I ask you, why take two days if he was so outraged? Two days or thereabouts, if there was any kind of rage

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on behalf of Jerome Reyes, why did he have to wait till Wednesday during the week, during the school week? That itself should suggest to you that what they're telling you and what your common sense should suggest is more likely true than not that it wasn't a big deal. It was mentioned as they gathered, eating junk food and shooting the breeze at

the Pink Pantry. And, in fact, what was the reason why they went down to Ballard High School, why else could they go? I'm not suggesting otherwise, on the first trip, and they went down there.

I won't rehash all of that for you. There was a confrontation, ugly, nasty, upset and something happened that I think also your common sense tells you. It was the cops that made them leave. I think the significance of that is known to all of you. "My dad says I can't go, my mom won't let me go, it's not all right." And I assume they're the same as kids have always been. "We left because the cops were there." That's somehow okay.

Okay. I direct your attention to some of the State's witnesses that there was some relief that nothing serious had happened as they left Ballard. There was a confrontation of whatever all this chest-to-chest shoving and so on has. It was stopped

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by the presence of the police and they left. And I urge you that the significance of it is just what your common sense suggests it is. It's a good excuse to leave with some dignity, "It was the cops, after all, not the fact we were run off by you. We went down, we showed them." All of them are factors that are true because your common sense says it's true.

You're asked to recharacterize them as somehow turning this into a vengeful-seeking mob. There isn't any evidence to that effect. There is no evidence from the State's own witnesses that somehow this was a violent rage or anything like that, regardless of the repeated effort to do so. And yet, throughout the case you're urged to believe that

somehow this was a calculated and deliberate plot going on. There isn't a shred or evidence to that effect. And importantly and again, I remind you not even from the State's own paid witnesses --

MS. MARCHESE: Your Honor, I am going to object to this continual reference to paid. There is no -- they weren't paid for anything.

MR. AUSTIN: Your Honor, they were given rendering criminal assistance and --

THE COURT: The objection's overruled. This

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is argument. Proceed.

MR. AUSTIN: Characterize it as you will. Rewarded. The witnesses, we don't care about that. The important thing in evaluating a witness's testimony is to consider what interest they may have in the proceeding, what bias they do have.

I remind you that all of these witnesses had something considerable at stake. And they were free of prosecution. And none of them say, "Okay, there was some instigation, there was some aiding, there was some urging on, there was some encouragement." And the reason why they said that is because nothing like that happened. It was just as unplanned, just as silly as some of the things we got into ourselves, just as your common sense says it was. And to make a determination that it was otherwise, you must have some evidence. You must have at least one witness to say, "Yes, there was considerable outrage and we decided we must make a plan and go back and deal with it." Or somebody must say, "We didn't do that, we just left." There's

nothing like that. Even with its probing, the only one suggesting anything like that is Brian Ronquillo kicking a fence, according to one witness. And I'll get to that in just a minute. There is no urging, no planning, no calculating. And

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yet you're asked, you're urged by the government to find that that was so, when your common sense says, yes, it's a possibility, but if it is, I'd like to see at least one witness say something that would confirm it was more than just drifting along as kids will. And again, please be cautious.

I'm not saying these are little babies or anything like that, they're kids. They do stupid things and dangerous things just like all kids will do, have done. But I ask you to use your common sense and look at the evidence. Is there anything in the evidence that suggests that you depart from your common sense and this particular set of facts and find that there was a deliberate and calculated plan discussed? There is nothing like that. And again, it's from the State's paid witnesses, the departure from Gaurav's house going to Kong's Pool Hall. And it's acknowledged that there was an agreement to swing back by Ballard High School, an agreement that was confirmed when they get back to Ballard High School and two cars pull up alongside each other.

I submit to you with what the evidence shows then is that there was one young fellow with a surprise on his mind, a surprise for his fellows to somehow show how cool he was in the group. And

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again, this is your common sense. Everybody's seen somebody start a fight, somebody tries to put the make on the barmaid. And the rest of us have to clean it up, get him out of jail or something like that. Anybody who's been in the Navy knows. You know that your common sense tells you, your common experience tells you that. Somebody wants to show in the group that they're cool, they want to do something wonderful.

Brian Ronquillo had gotten a gun similar to this one from Lolo outside of Gaurav's house and concealed his little surprise. That's what the evidence shows. The evidence shows that the only two people that know or knew at Gaurav's house were Mike Vicencio and Dinesh Pillay, from the State's own witnesses. A kid with a little surprise, a little kid, the youngest. One that wants to show them. Common sense tells you that's what happens in any kind of a group dynamic, whether it be the 23rd Street Diablos or any other kind of group. That's why we enter and leave groups. "Those guys are too crazy for me." And again, I'm not characterizing this as a bunch of kindergarten kids. I hope I'm appealing to your common sense, something that you already know.

One kid in any group will want to show a bit

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of style, a bit of class. And that's all that there was. That's what resulted in this horror, whipping out a gun, blasting the way out of a window is not excusable, not a showboating by a kid under any circumstances.

The question for you is, who participated in that, who knew about it, who aided, abetted, encouraged or participated in that. Jerome Reyes first became aware of the shooting when he heard the reports and thought they were being shot at. Counsel wants to urge you somehow that this meant they wouldn't have gone down there unless they did have a gun. He did the same thing that Mike Marckx did in the back seat. He ducked down, and then realized there was some shooting.

I invite your attention again to the ejection pattern of the spent brass. As the piece is fired, the brass goes forward. That suggests at least some of the shots were aimed backward along the back of the car, because two of the cartridges were found inside, one by Luke Gosho, who wiped it off, handed it forward and it was thrown out of the window by Brian Ronquillo. And the second one at Northgate, and it was disposed of. It was disposed of while Jerome Reyes was calling his friend, Gaurav, to get

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out of there and go home where he was going to be called by the police shortly, and he was going to await for their arrival. And he was going to try to minimize, he was going to lie, he was going to tell them that he wasn't at Ballard for about 15 minutes, and then he was going to complete his statement and give a statement that's acknowledged by Detective Maning that he acknowledged was consistent with his investigation. And that was by approximately 8:30 on Wednesday night, the 23rd of March, 1994.

His shock and horror is ironically emphasized by a selection made by the government in the

statement, not admitted to you, a statement recognized and acknowledged, but the very statement. And I cite this simply for the interest of accuracy: "You guys are taking off. What's Brian say? Nothing. I go, you shot the girl, your shot the girl. That's Vanessa, you fuck. I was like that, because the girl. I thought that was the one guy, I -- why did you shoot her, why did you shoot her. And he starts tripping, oh, my God, I didn't shoot her, oh, no, no, I thought they were BSP, did I hit the girl, shit, I don't know what happened, I just saw her falling down."

Again, the government urges that any regret was because of this Vanessa, that it simply confirms

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as they approached on that second trip there was no reason to shoot somebody that they knew or might know. Again, an effort to characterize something as they're going away, when he suddenly realizes first they're not being shot at, and he looked up and the first thing he says when he realizes that it's Brian Ronquillo shooting from the front seat, registers his shock and horror and confirms that there was no reason to expect any shooting, a confirmation seconded by Cesar Sarausad. "There were ten of us and only three of them. It was my car."

Criminals and killers don't have to be smart. They don't have to figure out these things before they get there. We wouldn't have courts of law in criminal cases if people were smart. But these people had been there an hour before, police had been in the area. Your common sense tells you what happened that day. This was a complete surprise

sprung by Brian Ronquillo who may or may not have been dissuaded if he had shown the gun from inside his pants. But the evidence before you is that Dinseh Pillay and Mike Vicencio, Lolo, gave him the gun without anybody else around at his request, Brian Ronquillo's request. And the evidence shows that it was at least Brian Ronquillo that said, "Let's swing back by Ballard."

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We all know that independently of anything else Jerome Reyes had an excuse to go to Ballard occasionally. He had a girlfriend over there. Simpson Wong summarized it up in his testimony, stupid, a guy going over to see his girlfriend getting run off by people, it is stupid. It's senseless. And it's an effort to make some kind of sense off this and portray some sort of conspiracy or a plot. The State has one step after another had to characterize everything in their favor to support a hypothesis. It's not the reasonable method. And each surmise after surmise flies in the face of your common sense. You are entitled to say, "Wait a minute, all my sympathy in the world for this lovely young girl and her family is not going to change the fact that I must decide this case based upon the evidence presented to me. I am not required to check my common sense at the door." All of your outrage, your visceral reaction that you have to something like this cannot change your responsibility as a juror. You're the one government agency that has no ambition. You're called from your jobs, your neighborhoods, your child care, everything else for a few days -- it may have seemed a lot longer in this case -- to render a duty, and you have no further ambitions to go on or

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anything else. You represent the community collectively and individually. Your common experience and training and education and background, and I suppose your verdict should be given more weight than a judge's decision. You've come out of the community, and because you're from the community you are affected by passion and rage and all of the other emotions that we encounter.

You come also on occasion to ameliorate the hardships, the strict application. What it is for you deliberating as a juror in your temporary capacity in an unambitious government agency to reflect the importance of the law, not vengeance, not anger, not outrage, not sending messages, as I guess the current phrase is. It is your job as a juror to carefully weigh this evidence, decide what the facts are in this case, decide what the facts are, not what you want them to be, not what somebody else wants them to be, decide based upon the evidence applying the presumption of innocence.

A defendant is presumed innocent. It's not a game, it's not a trick. It's a fact of hundreds of years of law that you're called upon to enforce. To convict Jerome Reyes of any crime you must decide, is he an accomplice of Brian Ronquillo. He was present

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at the scene. Did he do anything to aid, encourage, solicit, command Brian Ronquillo to shoot out that window? Did he even know about it? Even if you are satisfied he must have known tht there was a gun in the car, instruction number 46, "However, more than mere presence and knowledge of the criminal activity

of another must be known to establish that a person present is an accomplice." That's the law.

I submit to you that there is no evidence at all that Jerome Reyes was anything other than present at the scene, anything other than the guy that happened to pass along, "They ran me off at Ballard the other day." There is no evidence that he even knew that there was a gun. But even if you find that he did or should have circumstantially, he needs to do more than that to be an accomplice in the shooting, much less the premeditated and deliberate shooting of Melissa Fernandes, the intentional assaulting of Brent Mason, the attempted murder of Ryan Lam and Tam Nguyen.

(Counsel draws diagram.)

MR. AUSTIN: The evidence shows that the intersection was roughly shaped with the driveway into Ballard High School at the bottom. That there were at least three cars. Mr. Cooke indicates that

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he was coming along -- this is his Blazer -- to pick up his wife as he usually does, and coming along in this direction, that is, moving eastward. Though he didn't see it, we have other evidence that the brown car was fairly close to the red car. This is the second trip to Ballard.

Mr. Cooke does not recall the second car, and he recalls this as a red or maroonish car. I'll digress for a minute. I think you've seen through this case that six people seeing the same thing are going to have slightly different versions. That's what you as jurors must resolve and must recognize. It doesn't

mean that someone is automatically lying. It simply means that different perceptions are common. Even trained people and observers in combat are going to get slightly different stories. It is a natural human inclination.

In the brown car, driving, was Lolo. Lolo provided the gun. Lolo stored the gun. Lolo assisted in the concealment of the gun. Lolo knew there was a gun, knew that there were cartridges. Lolo had a second gun in the secret compartment of his brown car. Beside Lolo was Dinesh Pillay. He didn't even have to testify for his deal. He was present when the gun was provided, provided the gun. He assisted in

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recovering, concealing the gun in his own house, knew the girl had been shot and was on the point of death and is concealing the gun in his house.

Gerard Abad went to the meeting with Beaver at Bellevue and Brian Ronquillo and Luke Gosho that night, concealed, helped break up the gun. Rocky Galbay didn't even have to testify, either. Recovered the gun, concealed the gun.

Lev Arakelyan. I don't know what language he speaks. There was no interpreter as far as I know in that car. Made a deal also. Says, "I heard something, wouldn't have a gun if I knew it was a gun." Heard some kind of a click at the party. There's an example what key witnesses can do for you.

Cesar Sarausad, the defendant, got his own counsel. Brian Ronquillo doesn't have to testify.

He surprised everybody in that car. He knows he was trying to do something really cool, and he shot that girl to death.

MR. SAVAGE: Your Honor, we have a matter to take up before the Court.

THE COURT: At this time, counsel?

MR. SAVAGE: Well, your Honor, the record will show the point in the transcript to which I've raised the problem. And if the Court wishes to wait

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Until the morning recess, that's fine, as long as the matter is addressed prior to the time --

THE COURT: Court will wait for recess. Proceed.

MR AUSTIN: In the back seat, Mike Marckx, "I heard the shots, I ducked down. What could you have done to stop Brian Ronquillo from shooting? Nothing, sitting right behind him." You'll see the pictures of the red car. He made a deal to testify. Luke Gosho, middle, disposes of cartridges, went along with the ride over to talk about the disposition of the gun after the shooting, when they all knew she was on the point of death.

Jerome Reyes, there was not a shred of evidence that he knew there was a gun. He had a run-in with the BSP a couple of days before. There's not any evidence before you that he counseled, aided, encouraged, solicited or commanded. He was not provided a gun either before or after the shooting. When called by the police, not tracked down, not chased, he told them everything. He told them everything that was consistent with the entire

subsequent investigation and testified in front of you, talked freely to the police without counsel, knowing he had a right to counsel, knowing he had a

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right to remain silent. Told them everything, named names, everything.

Your question, without sympathy, without prejudice, without approval, your question as officers of the court is was he an accomplice. Besides his presence, is there circumstantial evidence that he might have known there was a gun in the car. Even with that, more is required to be an accomplice in the commission of a crime to commit a murder, to commit an assault. More than that. More than mere presence and more than mere knowledge. And that's the question as respects Jerome Reyes. And because you've come from the community, feel those passions, feel those sympathies, feel those prejudices, feel that outrage, feel that visceral sense. And if you are true to your oath, you will recognize them and set them aside and go through the evidence carefully and deliberate with your fellow jurors and decide what the facts are based on evidence or lack of evidence. And you'll conclude on this evidence that Jerome Reyes was not an accomplice. And you will not be patting him on the back or approving or anything else. You will simply be enforcing the letter of the law, and that's all I ask of you, not to go off and make, "I want the letter of the law enforced."

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by you as jurors.

And when you are done and you come back and worry one way or the other and second-guess yourselves as we all do, you will say, "I have enforced the law that Judge Jordan gave to me. I've listened carefully to the opinions of my fellow jurors, I've stated my own opinions and the reasons for it. And I've done my duty as a juror by enforcing the law." And that's all Jerome Reyes asks of you and I ask you in his behalf.

Thank you.

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(Jury present.)

THE COURT: Please be seated. Members of the jury, please give careful attention to Mr. Nance, who will present closing argument on behalf of Mr. Sarausad. Counsel?

MR. NANCE: Thank you. If it please the Court, counsel, ladies and gentlemen: Nothing has really changed about this case since the opening statement in which I stood before you and told you that this case was about a group of young men engaged in bravado and tough talk and juvenile macho antics who blundered into a senseless tragic killing. But for the tragic consequences that bring us here, much or most of the evidence we've heard about gang activities, jump-ins, the tough talk, the gang signs, the gang colors would be silly and ridiculous.

Cesar Sarausad is no more of a gang commando than the man in the moon. And the 23rd Street Diablos are the Keystone Cops of juvenile gangs. This wasn't even a gang that could shoot

straight. This was the gang that don't plan. This was a gang that couldn't plan trip to the park, let alone plan and carry out an execution.

Despite the State's efforts to paint Cesar Sarausad and the others with the damning broad brush

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of gang membership, it has failed that he was any part of a plot of a conspiracy or that he in any way on the day in question assisted in shooting or acted as a knowing accomplice.

We are, of course, here saddled with a totally inexcusable indefensible outrage. We have a schoolgirl, innocent girl minding her own business who is now dead. And the natural reaction that we all have to that is one of outrage, and that someone has to pay for this outrage. There is a very real danger that you as representatives of the community will react to that very natural feeling of sympathy for the victim and to your own natural sense of outrage. And the danger is highlighted I think by the dramatically drastically contrasting photographs that you have in this case of the victim, Melissa Fernandes.

On the other hand, you have a healthy, vibrant young woman in the very bloom of life. And on the other, you have a shaved corpse on the medical examiner's gurney. The defense has never disputed her death, never disputed how she was killed. And you should not be swayed by this evidence, the photographic evidence as anything more than proof of her death and the location of her head injury.

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There is, of course, the danger that you might feel that because this beautiful young woman died a needless death that these defendants must pay a steep price, and that you might think that with regard to what the evidence shows or what the law is intended or the manner in which you're instructed.

You may also believe there is a danger that anything, any time there is a death this senseless that there must be some kind of diabolical plot behind it for it to have happened. And that gangs or gang members, or even worse these particular gang members become scapegoats for the outrage that all of us feel about what happened here. Someone should pay if they plan to murder, whether they planned to hit Melissa Fernandes or hit someone else, if they planned it they should pay.

But it would be a terrible wrong if you convict Cesar Sarausad on the basis of your feelings and on the basis of your outrage if you do so in the face of insufficient evidence of his guilt as an accomplice in this case.

The basic facts here are pretty, they're mundane. But they reflect a more chaotic confused spontaneous manner of anything planned.

What began really as a day of leisure for

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Cesar Sarausad, he got up with the idea of going to shoot pool with a friend. That's how it all started, and it quickly degenerated into this nightmarish tragedy for which we've been hearing for about the past month. And there's sort of a theater of absurd

that can be played out. And frankly, I can tell you you run through the facts very quickly.

In essence, Cesar Sarausad learns that a fellow 23rd had been chased by three Bad Side Posse. To save face, the fellow 23rd's have to confront the BSP's. He agrees to drive them to Ballard High School to see if the BSP's were there. When they're there, they drive past, they wow them with gang signs, with colors, with insults, "Wuzzup, man." They exit their cars. They shout face-to-face. Then they leave. There's some pushing and shoving that goes on for about a minute and then they leave.

They go to a friend's house. They listen to music, they dance, initiate a new recruit that virtually none of them know.

Then they jump back into two cars, and en route to the pool hall decide to go to Ballard High School to see if the BSP's are still there. They're not really sure of who are BSP's, thinking that they probably would not be there and there probably would

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not be a fight. But if they were there, then they will be willing to fight them the way they fought them the first time. And that is by pushing and shoving and more tough talk.

And when they get there and when shots are fired, Cesar leaves in a panic, goes for a few blocks, stops, the gun's transferred. Then it's on to Northgate Mall to dump his passengers off, leaving them stranded without a ride home, before

retreating to the basement of his own home to await the eventual certain arrest by the police.

This is what passes for a formalized gang structure? This is knowingly assisting another to commit a murder? Where in all this is there evidence to suggest any semblance of planning beyond the moment? This mindless macho posturing and Three Stooges mentality that both preceded and following the shooting would be laughable if we didn't have a dead girl on our hands.

We heard repeatedly from an assortment of witnesses, some more credible than others, but all saying the same thing. There was no central plan here at all. Not one witness, not a single witness has described a specific plan to fight or shoot anyone. There was obviously no plan to deal with the aftermath

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of the shooting. There was no plan to dispose of the gun. There was no plan to dispose of the people in the car. There was no plan to get away from the police or to avoid arrest. There was no plan to avoid eyewitnesses. And there was no plan to escape detection in the first place. All of the nuances in this case suggest one thing, the one thing lacking here, was any real plan at all.

Now, the prosecution with its virtually unlimited resources, has been able to present a very thin circumstantial case against Cesar. I would suggest the proof is more suggestive, though, of his being simply caught up in a foolish macho taunting scheme that unexpectedly worsened severely when shooting erupted. There is not a single circumstance,

though, that points conclusively to his having any guilty knowledge or intent to assist in a shooting anywhere in the evidence.

The State's theory on Cesar Sarausad is one of accomplice liability. And the instructions give you detailed indications of what an accomplice is. An accomplice is just as guilty as the principal. There's no question about that. The law punishes one just as it does the other. But the obvious question to you is whether Cesar is actually an

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accomplice.

An accomplice is defined in the instructions as a person is an accomplice if, with knowledge, that it will promote or facilitate the commission of the crime, he aids or assists another person in planning or committing the crime. That's what an accomplice is.

There is no question here that Cesar Sarausad assisted Brian Ronquillo. That's beyond dispute. he drove him to the scene. The question is whether Cesar had knowledge that his assistance would promote or facilitate the crime of premeditated murder. That's the question for you. This could only have happened if Cesar knew that Brian Ronquillo had premeditated intent to murder someone. That's the only way.

With respect to every charged crime, Counts I through V, and the lesser included crime that you will be considering, it's the same question for you, did Cesar Sarausad have knowledge that his assistance in driving the car would promote or

facilitate the charged crime of a lesser crime being charged. That's the question. He had such knowledge only if he knew that Brian Ronquillo would commit the particular crime being charged, whether it's murder one,

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attempted murder one or manslaughter. If he did not think any crime was planned, he's not guilty of anything but bad judgment. If he didn't know of any plan to use the gun, he's not guilty since the gun was used in all the crimes and all the lesser crimes. And the burden is on the State to prove that Cesar is an accomplice beyond a reasonable doubt.

The State spent considerable time developing the fact that there was an earlier confrontation between the BSP's and the 23rd's. That has never been disputed. The 23rd's were clearly there during the noon hour at Ballard High. They were obnoxious, no question about that. They were taunting, they were cursing, they were flashing gang signs, gang colors. They got out, they engaged in a shoving match, no question about that, no dispute.

Various witnesses have described seeing a gun at the first confrontation. There may or may not have been a gun at the first confrontation. But that fact is not dispositive of anything in this case. In both the first confrontation and the later shooting incident witnesses had differing perceptions, there were various biases. And I would submit that given contradictory unlikely accounts of what actually happened.

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First among those was Ryan Lam, the alleged victim in Count III, the attempted murder. There is no question that he was fired upon. There is no question that he was beside his girlfriend, right by her side as she was killed. And he's justifiably bitter at what happened. He said things during his testimony that suggested some embellishment. He suggested a statement for the first time at trial, something that he never told the police or the investigators. He said he saw something exchange between the two cars immediately prior to the shooting. Mr. Lam also told us, well, he testified that the car shots came from the front of the car, although he told police officers earlier they came from the rear passenger side of the car. And he was confused about the order of the cars leaving. He was insistent that the brown car drove ahead of the red car, although we know differently. He specifically did not see anyone holding any gun on Arsalan Alavi, even though he was just a few feet away from him. And he claims that someone threatened Tong Ly by showing the handle of a gun to Tong, and he indicated, "You want some of this," indicating he was pointing to a gun during the pushing, although Tong specifically told us that he never saw a gun during the

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confrontation. And he was never threatened, never heard threats to himself or others.

Arsalan Alavi testified that he was held at gunpoint for two minutes, had a gun held to his head in broad daylight while surrounded by more than a dozen witnesses. And yet, not a single eyewitness has been produced to back this up.

The testimony was that the cars were only stopped and the guys got out of the car for about three minutes. And according to Arsalan, for two of the three minutes he had a gun to his head. He can't describe the person he saw doing this. I submit he's simply not credible. He even indicated that Vanessa Reeder, one of the women witnessing all this, was laughing at the whole thing during the very time he had a gun to his head. This is surreal, this is unbelievable.

We heard from the shop teacher, Danny Donovan. He was smoking within a few feet of the confrontation the first time. He heard nothing, nothing that raised his concern, until he said he heard from Arsalan, who he said he didn't believe enough to even tell the principal about it. He did say he called the kids back into the class, but no one else mentioned anything about a gun. This is a man who

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told us that he had great rapport with his kids, with his kids in his class. No one mentioned anything about a gun. Ryan Lam didn't mention anything to him, Soo Sacchao didn't mention anything to him.

State called Soodja Kutrakun, the inter-cultural specialist, to bolster its claim that a gun was present at the first confrontation. Mr. Kutrakun was there, but he didn't see a gun. The only improper thing he saw was the flashing of gang signs. He did say that he'd been told by two students, Tong Ly and Tam Nguyen, that a gun had been drawn. And he described the frightened appearance of Tong Ly as one who had looked like he had a gun drawn on him. The only problem with that is that Tong himself

testified that he never seen a gun, no gun was drawn on him and he didn't hear any threats. And Tam Nguyen in testimony admitted he wasn't even there.

Tam Nguyen, of course, was present during the actual shooting. He has no ax to grind with anyone that we could tell. He saw the red car come by during the first encounter before he left the scene. He was out there he said about 30 minutes, 20 minutes or so prior to the first time he saw the red car come down 67th. And then another five minutes after he sighted the red car the one time. He didn't

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see anything. He did not see a red car circling the block, which is something that Diane Klemz states she saw. She said that she saw the red car circle the block some ten times. Of course, she missed the black car, Gaurav's car, that we know was following the red car the whole time they were there. Only her neighbor, Joanne Hessian, also saw the red car circle the block that number of times. But she, too, missed the black car.

Ms. Klemz told you that she thought she saw the red car stopped by police during the first confrontation. She assumed that. She also told us that she thought she saw a gun in the red car. But the question is, could she have been mistaken. She didn't think enough of seeing a gun in the red car to call the police at that time, even in light of the live verbal abuse that she witnessed. Joanne Hessian was with her virtually the entire time. She was looking for something amiss, and she never saw a gun in the red car. And Ms. Klemz even acknowledged that five minutes after the shooting

she thought she saw the same red car on Alonzo, which we know the red car could not have been. The red car was en route to Northgate Mall at that time. Was this even the same red car? Probably, but we don't know.

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Given these inconsistencies, if you contrast Ms. Klemz' testimony with that of Emily Hiber's, Ms. Hiber says she saw two cars. She saw the red and the black car. They were following each other. She observed them for ten minutes, not some 40 minutes as Ms. Klemz testified. There was no circling of the block that she saw. She was looking, but she saw no gun. She was observant enough, though, to report the correct license plates to 911 while it was happening. Her observations of what was happening, the presence of two cars and the like, is much more in line with 67th, and it raises the possibility that Ms. Klemz saw something else or another car or something she thinks she saw such as a gun.

We heard from James Cooke, who was in the immediate vicinity when the shooting occurred. He was careful to describe how attentive he was to the details of the shooting and the care he took of the victim. But he missed the obvious point of the brown car following the red car. He never saw another car and was fairly sure there had not been a car. He told us about the red car making a swooping motion into the pathway of 67th, although minutes after the shooting he told police that he first saw the car going eastbound on 67th, without any mention of a

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swooping direction.

Diane Klemz, Joanne Hessian, James Cooke had no reason to make anything up here. And I'm not suggesting that they did. But their reported observations are a good example that there is no evidence more inherently unreliable than eyewitness testimony. They are honest witnesses. But their mind, with the benefit of hindsight that filled in the blanks with what they think actually happened. And if their recollection was suspect or questionable, how about those witnesses with possible motives to embellish? Was there a gun at the noon hour confrontation? All of the State's witnesses from both the red and the black car deny knowing anything about a gun. And of all the Ballard High witnesses present, only Ryan Lam, Soo Saechao and Arsalan Alavi claim to have seen one. And as I've indicated, Arsalan Alavi is unbelievable, flat out. Both indicated the gun was flashed in the proximity of Tong Ly. Tong Ly didn't see this. Quite possible there was no gun at all. Even if there was a gun, there is no evidence that Cesar Sarausad knew anything about it. And if we are to believe Ryan Lam's testimony about a gun, he said it came from the black car, not the red car. If there was no gun at the

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scene, it shows Ballard High students, witnesses simply seeing what's convenient, and it indicates a degree of bias on their part.

If there was a gun at the first confrontation and if there was a plan to shoot BSP's, why not shoot then? Why get out to argue at all? And this

business about, well, the police were there doesn't apply because they didn't see the police until they were already out of the car. You've got a gun, why bother going back to Lolo to get his gun? Why was a gun even necessary? And if there was a gun at the first encounter, it raises a series of other questions, such as who knew about a gun and when did they know about it. And does knowing about a gun at an earlier confrontation that was not used make it more likely that a different gun at a later confrontation would be used?

I suggest not. The State's proof has been compromised in this case by the assortment of deals that it handed out right and left to the others within the two cars. It puts the State in the position of asking you to believe the parts of their testimony that's helpful to their case and to ignore those parts that help the defense, despite the fact that respective deals that all of these witnesses

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have are conditioned on their complete and truthful testimony. Luke Gosho avoids a murder charge by pleading guilty to rendering criminal assistance. It exposes him to one year in jail, that's just a possibility. The same applies to Mike Marckx, the same applies to Mike Vicencio, the man who supplied the death weapon, the man who drove the following car with knowledge that Brian Ronquillo possessed a loaded gun, the man who helped dispose of the weapon after the shooting. He, too, has been permitted to plead guilty to rendering criminal assistance. He, too, faces a maximum of a year in jail.

Gosho and Vincencio have avoided exposure to lengthy prison sentences that includes a mandatory minimum 20 years in prison for the murder charge alone, in addition to consecutive or additional time for the attempted murders. And as they've acknowledged, then there is no parole one you go to prison, then there's limited good time. These three witnesses have avoided exposure to prison time of around 50 years to get about one year. The deal works two ways to cast doubt on the State's case. It gives these witnesses a strong overwhelming incentive to cooperate and gain favor with the prosecutor and bend their testimony in the State's

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favor. And to the extent that their testimony is unhelpful to the State, such as their saying there was no plan, there was no conspiracy to do any shooting or to use a gun, there is substantial reason to believe it. In other words, when Vicencio, Gosho and Marckx all tell us that there was no plan to shoot anyone, they're currently under contract to the State to testify truthfully. And the State, who called them as witnesses, is honoring their plea agreements by accepting their testimony as truthful.

The State knew what these witnesses would say before they put them on the stand. They knew they would deny knowing of the gun or knowing of an advance plan to shoot anyone or use a gun in any fashion. Yet, they offered them this deal conditioned on their truthful testimony. Now they want to argue that in spite of their unequivocal testimony that there was no deal, that there was no plan, that there was, in fact, such a plan and that Cesar Sarausad

knowingly assisted Brian Ronquillo in doing the shooting.

Not a single witness testified that he expected a shooting. All professed great surprise, disbelief that it happened at all. All indicated they would not have participated if they'd had any idea that this

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would have happened, most reluctantly admitted, perhaps, with the exception of Mike Vicencio. But the rest of them admitted that they didn't really want to fight at all. It was all just talk. And there was no reason to think that this final trip to Ballard High was any different than the first trip or would entail any more of a fight than the first trip. And frankly, their idea of a fight is to get out and pushing and shoving, scream insults at your rivals, show how tough you are.

Most of the 23rd's have never been to Ballard High before. Most of them have never been in a fight before. Most of them didn't know any BSP's. And also no testimony inconsistent with Cesar's own testimony that he didn't even think the BSP's would be there on their return trip. This was, after all, after the lunch hour. There's nothing in the background of any of these guys to suggest they would participate in a drive-by shooting.

It is a great quantum leap from tough talk about fighting to doing a drive-by shooting. Luke Gosho spoke for everyone when he said that he was glad that they left the first time because he didn't want to get arrested. What kind of a mind-set is this that would lead him to go back for a drive-by shooting?

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Why would anyone concerned about being arrested for fighting or trespassing even dream of participating in a drive-by shooting? There was no plan.

Gosho is also typical of a 23rd in that he had heard fighting talk, but he'd never been in a fight before, had never seen a group fight before, and hoping again there would be no fight. He did say that he heard a comment about the possibility of a shooting in the ride to Ballard High, and that's the only reason the State called him, was to get that out. But he did dismiss it as idle talk. He didn't take it seriously. He didn't ask to get out of the car, although he certainly would have if he had any idea this was remotely likely to have happened. He couldn't identify who said it or precisely what was said or who heard it. In fact, he covered his head as the shots were ringing out, which is consistent with not knowing in advance it would happen, which is consistent with his being ashamed, not wanting to be identified in this atrocious act. It is clearly not consistent with wanting to brazenly show your participation in a gang show of brute force as the State would have you believe this was.

Mike Marckx said some things about not knowing anything about a shooting. He had Brian and Cesar

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talking about a shooting -- I'm sorry -- he had them talking about a fight with the BSP's in the front seat of the car on the last drive over to Ballard. Why would there be any talk of fighting if the plan is to go

off and shoot? There's a big difference. Why talk about fighting at all in the car or at the house or anywhere else if the plan is to go shoot? That's what you talk about. You don't talk about fighting.

Mike Marckx also described the sounds within the car, the radio playing, or most of the time. Guys talking individually with one another not necessarily in group conversation. He thought he heard a comment, Marckx did, about capping moments before the shooting, said this came from the back seat. Capping was more like, there was a question, it was not a statement. It was not clear who said it. And of course, Reyes, Gosho and Marckx are the ones in the back seat. It was not clear that the comment was not clear as to meaning, it was not clear that it was audible over the radio music. And he did say there was nothing he could do to prevent the shooting because it happened so quickly. And we've heard testimony that it happened within about two seconds.

Let's lay forever to rest the notion that the car was completely stopped, the shots rang out,

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and then there's a quick speed-away. We know that could not have happened because of the physical evidence here. And I specifically refer to Exhibits 4 through 9, the spent cartridge casings. These were found at the scene, and they were found -- they're right on the diagram here beginning around the intersection, State's Exhibit No. 4, State's Exhibit No. 5, No. 6, No. 7, No. 8, No. 9. We have a scale here, 3/16ths of an inch is equal to approximately one foot. Well, the distance between Exhibit No. 4

where it was found and the point on Exhibit No. 9 on this map, on this diagram, is 21 inches. Per scale, that's 112 feet. Presumably within two seconds, this car traveled close to 112 feet.

Now, these things bounce, so we don't know exactly, but we know that the car wasn't sitting still. If the car had been sitting still, there would have been a clump of cartridge casings in the same spot. What the physical evidence shows is completely consistent with what Cesar Sarausad told you during his testimony, that he was trying to drive away as the shots were ringing out.

Terry Franklin, the ballistics expert, told us that this MAC-12 could be fired within two seconds, 10 to 12 shots could be fired within that

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period of time.

Mike Marckx describes Cesar as acting very surprised and alarmed. He thought he heard the comment, "That's enough, that's enough," which is consistent with wanting someone to stop bad behavior, like telling a child, "Stop, that's enough." Cesar doesn't remember saying anything.

There's still no indication that anyone expected any shooting to happen. Marckx describes Cesar as relatively unenthusiastic about fighting, mostly just driving. He didn't yell insults on the first trip. Cesar told us that he flashed a few gang signs, but he was not insulting anybody. He never seemed angry or upset about anything. Marckx told us he's a pretty quiet guy overall. And I would suggest that's consistent with the demeanor you saw on the witness

stand. Cesar is not a person that wears his emotions on his shirtsleeves.

We heard from Lev Arakelyan who testified to much the same. He did say that he heard some clicking sound at Gaurav's house in the garage. That was consistent with a clip going into a gun. He couldn't see what it was. He said it involved Jerome Reyes and Brian Ronquillo. Cesar was elsewhere in the house. He was not in the corner, not even clear he

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was in the same room.

Levi wasn't aware of any shooting plan. He planned to actually get out of the car at Ballard on the return trip, and was in the process of actually doing so when the shots were fired. The State elicited a comment from -- well, elicited to testimony of Levi that Brian had said during the transfer of the gun after the shooting, "Let's go to pool hall South." And I think the unfair implication of that was that, "Okay, we've just done this shooting, let's go have some fun now." That's unfair. This group had to go somewhere fast. They could have stopped. They didn't do that. They were trying to get away. They had to go somewhere, they knew they were in trouble. The pool hall was a familiar place, Pink Pantry was a familiar place, and the mall was a familiar place.

As it turns out, it was the closest of the three and that's where they ended up going. The reality was, their actions indicated genuine bewilderment what they were told or where they were to go. And, of course, Cesar was with them only momentarily.

He went to be by himself and deal with his problems and with the police, because he knew they were coming.

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Mike Vicencio, who owned and supplied the weapon, who drove the following car and who helped dispose of the weapon, if anyone would have known of Ronquillo's plan to shoot anybody he would have. There is not even proof of that. He told us that Cesar had never been in his car, was not aware of the secret compartment, had never seen the MAC-12 that was shown at Gaurav's party two or three weeks earlier. Incidentally, just so there's not some mistake, the photograph in the exhibit here, Exhibit No. 21, the interior photograph here initialed by Mike Vicencio, is of his car, his interior, not of Cesar's interior. Cesar's, this indicates a standard transmission. Cesar had a stick shift.

Vicencio had Cesar saying, "Are you ready," moments before they approached the intersection. This is an ambiguous comment at best. Could just as readily have meant, "Are you ready to do what we've done before," or, "Are you ready to follow me up and down the street and shout insults at these guys," or, "Are you ready to pull up, step outside the cars and shake our fists at these guys."

If there was a plan to shoot, why wasn't it discussed between the cars? Why wasn't the getaway discussed? Why wasn't there a plan where to go or

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what to do? Why no discussion on the disposal of the gun itself, or why not discuss the gun itself, where it was, what to do with it?

Vicencio, Marckx, Gosho and Levi all have deals conditioned on their truthfulness, all insist there was no plan to shoot anybody and that Cesar ws not part of any plan to shoot anybody. All were willing to stand on their testimony as truthful on these points, despite their exposure to many years in prison they face if their testimony is not true.

Now, it's hard to accept that a shooting so senseless is not somehow the product of an evil plan. But the indications are here that Brian Ronquillo simply acted in the moment. He may or may not have thought this out beforehand. There is no indication whatever he did, that he shared his thoughts with anyone else, and certainly not with Cesar Sarausad. I'm not here to defend him, he's got a very able counsel, Mr. Savage, that can do that. Whether he premeditated with intent to kill or even to shoot is one question for you to resolve. And even if he had such premeditation, the big question for you as to Cesar is whether he shared those intentions in some way. I submit there is no evidence of that.

We heard from Gaurav Nayar, he was not charged.

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he did not have a deal. He just was never charged. I would submit he was one of the least credible witnesses that we heard from. He minimized his involvement at every turn. He told us the purpose in going to Ballard High was to go over and see

Jerome's girlfriend, Brandy, and he took nine guys with him to do that. He claims he didn't see the MAC-12 shown at his own party two to three weeks earlier. But he did give us insights into Cesar's role in this matter.

For one thing, he broadened Cesar's background from that of a simple 23rd member to that of a good student, math tutor at Ingraham High. And he told us of the aftermath of the shooting when he went to Northgate Mall. When he got there, he found all of Cesar's passengers at Ballard at the shooting in the mall, Gosho, Marckx, Jerome and Brian. But not Cesar, who had already left. This supports the notion that Cesar was trying to distance himself as far as possible from the shooting as soon as he could, because he immediately recognized his wrongness. The passengers in his car were stranded without even a ride home. Wouldn't even the most basic of plans have provided for taking your passengers home? There was no master plan here. Why would anyone so quick to recognize the idiocy of shooting a gun in the

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direction of students have agreed to assist in shooting in the first place?

Cesar's actions after the shooting are consistent with a young man greatly troubled by what happened, shock, surprise, perhaps outraged, frightened, panicked, get away from these people he was involved with, go home, wait for the police. He did make a foolish choice in trying to lie his way out of things. He knew he was responsible, he knew his car was involved. He knew he was driving. The lies

were not the best source of action. But they reflect a scared kid. They do not reflect evidence of accomplice liability to a murder.

What about his flight from the scene? I would suggest his panicked reaction is completely consistent with surprise. Should he have immediately stopped and gone back to check on the welfare of the people being shot at? It would have meant facing an extremely hostile crowd. Using 20/20 hindsight, he probably should have done that. He probably should have stopped the car, taken his chances, gone back to see how bad things were. But this was a highly charged moment of panic and confusion. And he used poor judgment here.

He is not an accomplice because of his

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assistance to Brian Ronquillo in transporting from the scene of the shooting. His actions in driving away from the scene, however wrong they were, were done after the crime was complete. Accomplice liability requires that one assists with knowledge, that their actions will promote or facilitate the commission of the crime. Helping Ronquillo get away probably constitutes another crime, rendering criminal assistance, the same crime that Gosho, Marckx and Vicencio have all pled guilty to. But that crime is not before your for consideration. That crime is not charged at this time. And this was not flight in the classic sense. He didn't attempt to leave the country or leave the state or leave the city, or even leave his neighborhood. He knew the police would be along for him. He knew his license tags

had been identified at the scene, or had reason to think so.

He ran, but he didn't run far. He ran back to his door and he hid in his house knowing that the police would soon be there. He could have turned himself in. He chose not to. He chose instead to wait for the inevitable. He chose poorly, but he chose to make a desperate attempt to provide a false alibi. He denied being there, denied knowing who was there. He stalled the police for a few hours, then

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he came clean. And he told Detective Gebo and he told the other police, police officers involved, what he had done, his role. He even took them to the homes of the other occupants of these cars to assist in their case investigation. And he did so the very night of the shooting.

If there was really a plan to shoot BSP's that day, why in the world take two cars? Why bring ten people? Why create additional witnesses? You only need a driver and a shooter to drive by. Why make yourself more visible? Why use a car already seen? He'd been there one time, they knew his car. Why not cover your faces? And there is no evidence that Cesar ever covered his face with a bandana on either trip. Why not cover the license plates? And why go at a time an hour after the lunch period when you aren't even sure BSP's would be there? And why go when you weren't sure there really were BSP's?

Cesar mentioned the possibility of an APB immediately after the shooting. It was an immediate obvious concern to him. Surely he would have recognized this before going over to do a shooting

that there would be an APB and he would decide against it. Why would he take the family car to a public shooting? Why in the world? Why go there in

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front of a school yard of eyewitnesses to do such a dastardly thing? And again, if there was any plan at all to shoot anyone, why not plan beyond the transfer of the gun a few blocks from the shooting? And why not plan beyond the dumping of passengers at Northgate or how people would get home or plan on beyond returning the car to his home to await arrest?

The chaos that reigned after the shooting belie any plan at all. He even learned about the secret compartment in Lolo's car as he was pulling off to the side of the road, somebody mentioned it to him. The later muddled actions of Ronquillo and Gerard Abad and Beaver in disposing of the gun are further evidence that this was haphazard and totally unplanned, further evidence of an overall lack of plan. And by this time, of course, Cesar was under arrest. He has no idea what happened to the gun. Why would grand conspirators fail to plan something so basic as the disposal of the murder weapon?

We heard bullet trajectory analysis. I would submit it's ambiguous at best. Michael Grubb is fully qualified to testify, but he said that this was a very imprecise sort of thing. There's a big margin of error in the placement of the origin of the shots. And he's only able to measure three shots with any

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precision at all out of the ten or so that was fired. He really tells us nothing new. And there is nothing

there that's inconsistent with Cesar's testimony about the placement of his vehicle during the fired shots.

I would suggest, submit that the best evidence is where the cartridges were actually found. It's completely consistent with what Cesar told you on the stand.

Now, the cement that supposedly makes this all a conspiracy -- they haven't been charged with conspiracy, but I keep mentioning conspiracy because it entails a plan or something beyond acting in the moment -- the cement that supposedly made this happen was the common gang affiliation of the occupants of both cars. The word gang is a scary word. It sounds terrible at first until you examine what it really meant in this case. I would suggest it's greatly overblown and oversold. Individuals are on trial here, not their gang. The State called the so-called gang expert, Roger Rusness, a well-meaning officer, but one with limited -- well, actually, with quite a bit of practice experience in the field, but inadequate cultural training to back up the stereotypical classifications that he told you about. His

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knowledge of the 23rd's is basically based on what he's been told by two anonymous members of the 23rd's.

You heard from people in this courtroom and this trial more knowledgeable about the 23rd's than Officer Rusness. He told us about gang loyalty, tattoos, habits -- there were no tattoos on Cesar -- tattoos, habits. We heard nothing about Cesar,

anything he'd done specifically. He had minimal formal education, Detective Rusness, knew very little about the Filipino language, Tagalog. He knew little about culture or special immigrant problems. He spoke about dysfunctional families being the springboard for individuals becoming involved in the 23rd's. And he said that 23rd members have no feelings of belonging anywhere else, although Cesar contradicts that stereotype in a big way.

He has a loving, supportive family who have been here in court with him the entire trial who he lived with, has always lived with prior to the shooting.

Gang expert Rusness didn't even know who supposedly runs things for the 23rd's in the North End of Seattle or who these mysterious four Horsemen were. Now, it's curious that he also mentioned getting beat out of the 23rd's. And he acknowledged

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that he'd never seen a jump-in. It's curious that not a single member of the 23rd's, people who are in the know who would know also did not know anything about being beat out of the 23rd's and had never heard the term Horsemen used. Officer Rusness' bias is obvious by the way the Court struck some of his testimony for its biased contents.

MS. MARCHESE: Your Honor, I object and move to strike. That is completely improper argument, completely mischaracterizes what occurred.

MR. NANCE: It's in the record.

THE COURT: The jury will rely upon their collective memories. Proceed. This is argument.

MR. NANCE: The State took pains to draw out this initiation procedure, this jump-in, by trying to suggest that this was a very violent ordeal, suggestive of ultraviolent activity, although no witnesses ever told us he was hurt. I suggest it's more akin to the college hazing that used to occur a generation ago that many of you either went through or know about.

The State has sought to portray Cesar as something that he's not. They've labeled him as a recruiter within the 23rd's. Yet, Simpson Wong said everyone in the 23rd's is a recruiter. Akin to any

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of us joining a club or church or organization being a recruiter, it's something that you are as any member of any organization. Simpson Wong had never heard about Horsemen or formal gang structure. This is nonsense fed to Officer Rusness by his anonymous sources. There is no charter, there is no oath of allegiance or formal procedure for initiating the recruits. It's loose and an informal organization with little or no leadership structure that guys get into for companionship, social gatherings, a sense of belonging. Protection I guess is an aspect, it's true. And respect is important, that's true. But it's got to be in perspective. No one's required to fight or commit crimes or do anything they don't really want to do. And as Mr. Kutrakun told you, the main distinguishing feature of the 23rd's is they're mostly Filipino.

The State has succeeded merely in establishing a foolish conglomeration of macho kids desperate to be men, desperate to be perceived as men. And yet, through their actions, proving beyond any measure that they are just boys and they're not so tough, they're not so brave. And Cesar was the first to tell you on the stand that he was foolish and he feels embarrassed and immature and irresponsible, might even

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argue cowardly. But he's not an accomplice to murder.

Cesar testified. I would suggest that was a brave thing for him to do. The earlier actions were cowardly. He could easily have rested on the lack of evidence, could have argued lack of proof. But he chose to waive his Fifth Amendment privilege to remain silent to put his --

MR. SAVAGE: I have a legal matter to bring to the Court's attention.

MR. NANCE: He chose to put his credibility on the line to subject himself to a very searching, thorough cross-examination to tell what happened, what he was thinking, why he did what he did. He's ashamed of his involvement and he does feel responsible for what happened. He knows that if he'd refused to drive over to Ballard that day, he knows Melissa Fernandes would still be alive. He knows that. He feels guilty about that, and he's acknowledged his role and his sense of shame and responsibility and embarrassment to himself and to his family. And in doing so, he's finally begun to see that the boy in him is becoming a man. The tough

macho fight talk doesn't compare to the inner strength necessary to acknowledge his own shortcomings.

He is the best source of what the real question

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you have to decide is, and that's whether he knew of any plan to kill or knowingly assist Brian Ronquillo in doing the shooting. Only he knows for sure. He told you he didn't know, and he was believable. And I would submit that his testimony is entirely consistent with the physical evidence and circumstantial evidence.

Cesar has faced social barriers that I would suggest most of us have not faced. He's a new immigrant coming to the United States when he was 12 years old. He's now a U.S. citizen. But he faced some barriers. He's an ethnic minority. He was a foreigner, he spoke with an obvious accent. English was his third language. He was naturally shy. He perceived himself as a bit of a nerd. He was bright, but he had some handicaps. We should be slow to judge him for this social outlet he sought. Like most of us, he sought a sense of belonging, a sense of identity. He's made some choices that were perhaps ill-advised. He chose to associate with this group of young men, of the 23rd's. He chose to lend his car to a dubious proposition, going to Ballard.

He is accountable legally and morally for what he did, but for no more. There is a redeeming side to Cesar Sarausad. He's a 23rd Street Diablos gang

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member, but he's also an academic achiever who excelled in math, who tutored less gifted students than himself. Who was making the grade as an engineering student at the University of Washington, who had a promising professional career in his future. He has a loving family with friends in the community.

He had simply too much going for him to involve himself in gun violence, and certainly in a murder plot. And of course, if thinking properly he would not have become involved at all. But it's one thing to play the fool when you put childish behavior on display for the world to see, and an entirely different thing to aid and abet a murder. He would not have done this. There was no compelling reason, this was not his fight, this was not his quarrel.

The prosecutor talked about respect and what he would do as a gang member for respect. This has to be put in perspective. This was a chasing incident, a chasing incident that perhaps some gang logic might have required a response of some sort to regain respect. But it called for a response in kind, and that response in kind was met on the first trip to Ballard. Shooting someone or chasing is like responding with a slingshot at an atom bomb. It's gross, gross overkill and that's way, way out of

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proportion to the initial disrespect.

They were on BSP turf. Even being there, and Cesar indicated he was almost reluctant to go back, but he did so out of a silly sense of obligation. No loose association with any group would or could

compel him to do the totally self-destructive illogical irrational act of murder, and he has not done so.

You know, if we were all judged on the basis of foolish things we've done in the past, we'd all be a little more humble. Maybe none of us have driven a car from which deadly shots were fired. But we've all done things that we're not especially proud of. Well, this was Cesar's day. This was the supreme folly of his life. He's profoundly sorry for what happened to Melissa Fernandes and for his role in it. Some of that remorse came out on the witness stand. He's a naturally shy person, not accustomed to public speaking, not accustomed to testifying, to sharing his feelings, expressing them in a public place, especially in front of a TV camera. But as bad as it is, the supreme folly, this very poor judgment on this day, does not equate the accomplice liability to the charged crimes.

You are permitted under the instructions to

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consider lesser included offenses, premeditated murder is not supported by the evidence. If you agree with that, I submit that you should, given the lack of evidence, the instructions direct you to consider the lesser included offense of murder in the second degree and manslaughter. If you have a question about the proper degree of a charge that supports the evidence, you always adopt for the lesser charge. If you have a question about the lowest charge or doubt, you opt for acquittal. Even manslaughter under this evidence is inappropriate.

In opening I told you Cesar would be held accountable morally and legally for what he did.

What he did was wrong. He got involved in fighting with a rival group. He contributed to the angst by providing transportation back over to Ballard High. But for his actions, this whole thing might not have happened if he was smart enough and old enough to know better, and he did know better. And the instructions permit you to consider whether his actions constituted reckless knowledge or not. His actions were reckless if he disregarded a substantial risk that shooting would occur and if the recklessness contributed to Melissa Fernandes' death. But if he didn't know of a gun or plans for use of a gun for

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any purpose, he was not an accomplice under the instructions even as to manslaughter. Because he didn't have knowledge his own actions would promote or facilitate the crime.

This is a criminal case. And as you've been told from the very beginning in voir dire, there are certain precepts that apply in every criminal case, presumption of innocence, burden of proof, proof beyond a reasonable doubt are all precepts that apply. This is not guilt by accusation. It's not guilt by information. An information is a flimsy piece of paper, it's not evidence. Presumption of innocence which fully applies in this and every criminal case is the shield that protects each and every one of us from arbitrary government action. Presumption of innocence is what you or I would feel if a member of our family were suddenly and without apparent reason accused of a crime. We would feel shock, disbelief, skepticism at the charges, "Prove it to me, I don't believe it." That's the skepticism you owe

Cesar Sarausad in the State's case against him. Make them prove it. They haven't done so.

Burden of proof is on the State because of its vast power, money and resources. There are two deputy prosecutors in this case. And I suggest

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they're both highly competent. But behind them is the entire police force of the state. They've got the resources, they've got the tools. They've got the police, they've got the labs. They've go the technicians at their disposal. The burden of proof placed on the State simply makes this a fair fight. The seriousness of the charges is all the more reason that the burden of proof should remain with the State, because the consequences of Cesar Sarausad being convicted of murder are extraordinarily serious for him. And because the State is seeking to take away his freedom, the burden of proof is properly on its shoulders.

The law says you may consider punishment for these alleged crimes insofar as it may tend to make you careful. Please be very careful. And if something is missing in this case, you should ask yourself whose burden has it been to produce it. It's been the State's burden. The standard of proof, you read your juror handbooks, you know there are civil cases and criminal cases. In civil cases, the proof is proof by a preponderance. That's an appropriate standard in civil cases where we're talking about money damages. In criminal cases, the stakes are far higher. It's not mere money, it's human liberty

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we're talking about, the liberty and the freedom of Cesar Sarausad. Life as he knows it is on the line.

Then there's reasonable doubt. We know in nature and in our common experience all is not black and white. In fact, most things are not black and white. There is a vast gray area in between. And in law, all is not guilt or innocence. In between there's the vast area of reasonable doubt. And because of what's at stake here, freedom itself, unless the State exhausts every single reason to doubt, freedom shall not be spent in the gray areas enough to acquit. Because of what's at stake here, reasonable doubt is freedom. What's reasonable doubt? It's a doubt for which a reason exists. It's a reason to doubt, any doubt with a reason is enough. Any reason to doubt is enough. One single doubt, however small with a reason on a single element of a charge is reasonable doubt.

The standard makes sense when you think of the magnitude of your decision and the consequences of your decision if you convict and if you're wrong. You must be firmly convinced of the truth of the charges to return a conviction. If you vote to convict, you must be absolutely sure at the time you vote that you'll never have second thoughts about

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your choice, not tomorrow, next week, next year. Because once your vote's in, you can't change your mind and you can't repay lost freedom.

Where is the reasonable doubt in this case? It's everywhere you look. To convict Cesar Sarausad as an accomplice to murder, you must believe all of the witnesses' collective testimony beyond a

reasonable doubt. And in addition, you must believe beyond a reasonable doubt that he had premeditated intent to commit murder from circumstantial evidence. You've got a reasonable doubt if you have any doubt that Cesar was part of a plot to shoot anyone. You have reasonable doubt if you have any doubt that Cesar knew of Brian Ronquillo's gun or any plan to use it. You have reasonable doubt if you think Cesar might have been telling you the truth. You can't convict him unless you believe he's lying beyond a reasonable doubt.

He doesn't have the face or the demeanor of a murderer. You have a reasonable doubt if you believe any of the State's witnesses might be telling the truth about the absence of a plan to shoot anyone that day. You have a reasonable doubt if you believe any evidence of prior violent activity on his part is indicative of his lack of involvement in the murder

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plot. You have a reasonable doubt if it's reasonable Cesar would have thought the BSP's might not even be present on his return trip to Ballard High that day or that the plan was no different on this trip than it was earlier in the day. That's a reasonable doubt.

If you think that Cesar simply had too much going for him, college education, promising future, good supportive family to throw it all away on a murder with a frivolous motive, that's a reasonable doubt.

To find Cesar Sarausad guilty as charged, you must find beyond a reasonable doubt that he knowingly assisted in a plot to kill strangers in broad

daylight before a score of witnesses while driving the family car, knowing he would be caught within hours, all to avenge his friend who has been chased, disrespected, but unharmed two days earlier.

This was not near poor judgment. It happened to be insanity. There are hundreds of reasons to doubt in this case and you only need one. The ultimate question is not whether you approve of his judgment. It's not whether you approve of his juvenile gang affiliations or whether you think his gang affiliations were petty or juvenile or idiotic, or whether you would invite him over for dinner. The

[3111]

question is whether the State's proved beyond a reasonable doubt and overcome his presumption of innocence. The answer is no. Cesar is not guilty of the charges.

Thank you.

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THE COURT: Thank you, Mr. Savage. Rebuttal argument.

MS. MARCHESE: We've sat and listened attentively to the arguments of the defendants' lawyers. And as Mr. Nance compared the 23rd Street Diablos to a church group, I was reminded of something rather interesting. I guess the collective wisdom is the defense lawyers would have you believe in this case is that this was the immaculate

murder, nobody did anything, nobody said anything ..

MR. SAVAGE: Your Honor, if she's including me in that, I object.

THE COURT: This is argument, counsel. Proceed. Proceed, this is argument.

MS. MARCHESE: Nobody planned anything, nobody wanted anything to happen. This car somehow drove down 14th Street by itself. The gun just happened to be fired in the direction of three people and Melissa Fernandes just happened to be murdered most cowardly and most brutally. The immaculate murder. See no evil, hear no evil, do no evil.

[3125]

Now, talk about common sense. Common sense tells you, ladies and gentlemen, this was not the immaculate murder. These three defendants are here to answer for their respective conduct. The shooter, the driver of the shooter car, and the instigator. As I told you at the end of my remarks, but for Jerome Reyes they never would have been at that school that day. But for Cesar Sarausad, the defendant, Mr. Ronquillo, would have never been able to fire the shots, their number and their direction had that car been driven in a manner which allowed him to do. And but for the defendant, Mr. Ronquillo, Ms. Fernandes would still be alive.

Brent Mason wouldn't have a scar on his leg. Ryan Lam and Tam Nguyen would never have to live this horrible nightmare for the rest of their lives as

victims of attempted murder. An immaculate murder? Not on your life.

Much was said about these -- I've heard, let's see, paid bribe witnesses, witnesses under contract, and if I've forgotten one, it's not intentional. I'm trying to recall the things they've been called. Let's see. We had paid witnesses, we had legally bribed witnesses, we had -- can't remember anything else. But you remember the aspersions that

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were cast. So be it. I'm not up here to apologize to you for anything. Ladies and gentlemen, the State of Washington has put on trial the three people sitting in these chairs are the three most responsible. And for us to proceed against the three most responsible with admissible evidence, you've heard what people pled to in this case. There isn't one person in either car which walked out a free man.

You don't like the fact that Lolo Vicencio isn't sitting there with these three people, that doesn't change what they did. That does not change what they did. It's brought to your attention so you forget what they're here for and say it's not fair. But it is fair, ladies and gentlemen. Lolo Vicencio didn't fire the trigger. He didn't point the gun. He didn't aim, he didn't fire. The defendant, Mr. Ronquillo, is the one who asked him for the gun. It wasn't Lolo's beef.

We're not here to apologize to you. You can read the evidence that shows the nature of the agreement and what they were required to do. The only thing we asked of them is that they testify truthfully. Whether they did or not is up for you to

decide. But I submit to you, ladies and gentlemen, what did they tell you? It didn't come from any

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other witnesses in this case that begrudgingly was given to us by the defendant, Mr. Sarausad, and the defendant, Mr. Reyes? That they were there to fight? They were there to gain respect. That came from the defendant, Mr. Reyes' own mouth when he testified. They were there to avenge what had happened to him. And as they told you, they'd fight somebody they didn't know. They'd fight somebody they didn't know because that's part of the life of a gang. This is not a church group. This isn't a group that raises money for Fred Hutchinson. They're not a social club. They're not sponsoring dances and doing social activities. They are what they are, and you've heard all about the 23rd Street Diablos. And let's not mince words and let's not allow them to be painted as anything other than what they are.

Yes, actions do speak louder than words, and their actions that day, ladies and gentlemen, belie the claim of the immaculate murder, that nobody did anything, nobody knew anything, nobody wanted anything to happen. The fact of the matter is, ladies and gentlemen, a gun was fired not once, but several times in the direction of two people they thought were BSP's. That came from their own mouths, the witnesses themselves. The fact of the matter is this

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MAC-12 was fired. It was fired by the defendant, Mr. Ronquillo, while his buddy was driving the car in a manner which allowed him to do it. And the

reason they were there is because of the defendant, Mr. Reyes.

Actions speak louder than words, and there is nothing, nothing whatsoever in the accomplice liability instructions that you have that says they have to sit down and plan a talk about it. It is sufficient, ladies and gentlemen, if you are present, if you are ready to assist.

Let me give you an example of that. Simpson Wong told us something very, very important about accomplice liability. Simpson Wong told us about gang loyalty and what it means. Nobody had a discussion with Simpson Wong about destroying the gun. Nobody sat down and planned with him how he'd do it. Nobody had to tell him. The fact of the matter, ladies and gentlemen, is that he did it. And remember what he told you? He told you why he did it, "They do it for me, it was understood we had to get rid of the gun." The fact that he didn't sit down and plan deliberately with any other witness in the case doesn't mean that the gun wasn't destroyed.

And the same goes for these three defendants.

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And what happened in that car as it rolled down 14th toward the school, it was understood, ladies and gentlemen.

The defendants' lawyers in this case would have you look at every incident that happened in a vacuum, in isolation from one another. This was a continuing course of conduct that erupted in wide-scale violence, that erupted in a premeditated murder, two premeditated murders and an assault.

Now, they'd have you believe, "We're too young to do that, we're too stupid to do that, I've got too much going for me to do that." And ladies and gentlemen, it is offensive to suggest for example that Cesar Sarausad has too much going for him to be held accountable for this crime. He's lucky he has his life, because that's a heck of a lot more than Melissa Fernandes has. And that's no excuse for his conduct. It's a stupid defense, "This is a stupid action, I'm stupid, therefore, I'm not guilty." And you should reject that outright, ladies and gentlemen, as outrageous.

The fact of the matter is he was there not for one encounter, but all encounters that day. He did drive the car. For someone who's so smart and such a math major, you'd think he'd be able to add

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two and two. You'd think he knew what was going on.

I agree with the defendant, Mr. Ronquillo's lawyer, it's hard to imagine that a group of 23rd Street Diablos are rolling up to a school, the defendant, Mr. Ronquillo, has a gun and nobody's talking about anything. Well, we know that's not true. Mike Marckx told us that. Luke Gosho told us that. "What are our choices? Shoot pool? Shoot people? Or do nothing? Well, let's shoot people first, then we'll shoot pool." But the decision to do nothing was not made by the defendant, Mr. Ronquillo. It wasn't made by the defendant, Cesar Sarausad. And it sure as heck wasn't made by the defendant, Jerome Reyes.

It was understood, ladies and gentlemen. These aren't strangers to one another. They are 23rd street Diablos. An affront to one is an affront to all. They knew why there were going down there. And the suggestion or the notion that these shots were being fired in the ground, these fountains of dust and so forth is absolutely ludicrous.

Talk about kids? Talk about age? This is not a toy (indicating). It's a murder weapon. The defendant, Mr. Ronquillo, the evidence shows, knew exactly what he was doing. Age didn't prevent him

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from loading the magazine. Age didn't prevent him from pulling back the slide. Age didn't prevent him from taking off the safety. Age didn't prevent him, ladies and gentlemen, for having the sense of mind to pull the bandana up over his head so witnesses on the street wouldn't be able to identify him. And age, ladies and gentlemen, didn't prevent him from taking somebody else's life and almost taking others.

Now, the defendant's lawyer would have you believe or ask you to excuse his conduct because he's a kid. I told you in the opening part of you closing Melissa Fernandes was old enough to die. The defendant, Brian Ronquillo, was old enough to shoot her and he is old enough to sit before you and to be held accountable for his conduct.

Cesar Sarausad is old enough and smart enough to be held accountable for his conduct. The defendant, Mr. Reyes, is old enough, smart enough to be held accountable for his conduct.

You won't get an instruction in any of the 50 that says you may excuse their conduct out of sympathy, you may excuse their conduct because you want Mr. Sarausad to go back to school, you may excuse their conduct because they're too young. Because that is not the law in this case.

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The defendant, Mr. Reyes, through Arsalan Alavi -- and you can just imagine Mr. Alavi telling them they were weak, telling them they were no good -- Mr. Reyes' parting comment to Alavi in the group was, "You're going to get served." That wasn't with a legal piece of paper. Arsalan Alavi told us what it meant to be served. Means, "You better watch your back, you better watch out." And that's exactly what happened.

Ballard High School got served by the 23rd Street Diablos just an hour later. Defendant Mr. Reyes says, "Believe me when I say I didn't know, believe me when I testify I had nothing to do with this." The defendant, Mr. Reyes, wants you to believe, "I was so shocked and I was so outraged and I was so surprised, believe me when I tell you that." Yet, he's admitted lying. He tried a false alibi, that didn't work. He tried to even blame it on the BSP's. That wasn't going to work. Especially when he was confronted with the details of the shooting by the police. Only then, only then did he admit he had lied.

The thing you need to ask yourself is why he lied. He lied to avoid being in trouble. And it was interesting when Mr. Reyes testified, he was rather

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emotional, we all saw that, it was interesting when he got emotional. It wasn't in talking about Melissa Fernandes. It was when he had to name his friend, the defendant, Mr. Ronquillo, as the shooter. It was when he had to name the defendant, Mr. Sarausad. I submit to you, ladies and gentlemen, they were crocodile tears for himself and no one else. And if that was his motive when he talked to the police to lie to avoid being held accountable or responsible, what was his motive when he got up on that witness stand when he told you what he told you? When he wanted you to believe that the BSP's carry guns, but he was only going to go there with his fists? Same goes with the defendant, Mr. Sarausad, who told you in very plain English, "I was trying to talk my way out of trouble." He said it several times, "I was trying to talk my way out of trouble. I'm smart. I'm not stupid. I'm trying to tell the cops you gotta be stupid to think I'd go down to Ballard High. They're my enemies. You've got to be stupid I drive my car down there." He wanted the cops to believe it.

Now, he wants you to believe it, the stupid defense, "I'm too smart to have anything to do with this." You know why he told that to the cops? Because he was trying to talk his way out of it. And

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I submit to you, ladies and gentlemen, his motive to lie has not changed in the least bit. He's still trying to talk his way out of it. He's still trying to tell you, "I'm too smart for this." His motive to lie has not changed one shred.

Jerome Reyes, who the defendant's lawer told you, he told them everything once he finally realized

that they were on to him, he didn't tell them everything and he didn't tell you everything. He didn't tell them where the gun was, when the gun was transferred on its path to being destroyed. Rather glaring omission, a good example of why when I tell you he didn't tell the police everything. And he didn't tell you everything. That's just a good example.

I want to talk with you finally about the accomplice liability instruction. I think it just bears comment, and I promise I will sit down and this case will soon be yours to decide. The defendant, Mr. Sarausad's lawyer says that an accomplice has to have the same mental state as the person doing the shooting. Cesar Sarausad, Jerome Reyes also had to have premeditated intent. Not true, not true. And that's not what the instruction says.

And I've told you the old adage, you're in

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for a dime, you're in for a dollar. If their logic was correct, they're not ever an accomplice to anything. The getaway driver for a bank robbery would say, "I just told him to rob them, I didn't tell him to shoot him, I didn't do anything." The example I gave you earlier, "I just told my friend to hold the arms down of this person while he hit him, I didn't tell him to kill him, I'm not guilty of anything." If you're in for a dime, you're in for a dollar.

When they rode down to Ballard High School that last time, I say they knew what they were up to. They knew they were there to commit a crime, to disrespect the gang, to fight, to shoot, to get that respect back. A fist didn't work, pushing didn't work.

Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar.

The defendant, Mr. Ronquillo, did not act alone. He acted with the assistance of the driver, Mr. Sarausad, and the instigator in the premeditated act. Why so many shots? Why ten pulls of the trigger aimed in the direction? And when you look at these trajectory photographs, the only thing Mr. Grubb said varies is where the car was along the street as

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the gun was being fired, not the horizontal plane of fire. It is disingenuous to say it's because they ended up low on the wall that's where they came across the street at a low level. They all testified they came through on a horizontal plane through the direction of fire through the crime scene. They were all fired horizontally. And he demonstrated it with his arm. You can see where those lines intersect.

The defendant was firing at two intended targets, two people that they thought were BSP's. That was no accident. That was no product of being stupid or product of age. That was the object of their rage.

Ladies and gentlemen, this is a case about accountability, not a verdict that's based on sympathy, a verdict that is based on accountability. Holding these three defendants accountable for their conduct. Let's call these crimes what they were. Murder one, premeditated murder one, which does not require a conspiracy or hours or even minutes for that matter of planning. More than a moment in time in which the design to kill is deliberately

formed. From the first shot to the last shot, on the driving to the aiming to the bandana, defendant, Mr. Ronquillo, knew exactly what he was doing and exactly who he was

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aiming at. And he knew, the defendant, Mr. Sarausad, wasn't going to jerk away from the curb or drive away out of surprise or shock at what he was doing. He knew Mr. Sarausad was going to drive the car, slow down for him to be able to get off those shots and shoot at the two people he thought were BSP's. And but for the defendant, Mr. Reyes, they never would have been there in the first place.

This need to avenge respect never would have been, never would have been. Melissa Fernandes paid with her life for their respect. For that, these defendants should be held accountable for murder in the first degree. Tam Nguyen and Ryan Lam also paid with their life so they could be respected. For that, as I've told you, they will live this horror for the rest of their lives. For that, the defendants must be held accountable for attempted murder in the first degree. Brent Mason was the luckiest of the lot. As I told you before, he only had to pay with a shot in the leg so that these defendants could be respected.

I ask you to hold them accountable for their conduct, not excuse it for sympathy. I ask you to return verdicts of guilty as to all three defendants as they are charged. Thank you.

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SUPERIOR COURT OF WASHINGTON

COUNTY OF KING

[Caption Omitted In Printing]

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY:

Request clarification on instructions No. 11 & No. 12 element (3); does the "intent" apply to (the defendant only) or to (the defendant or his accomplice)?

DREW ANDERSON 25 OCT 94 11:30 AM

FOREMAN DATE AND TIME

Date and Time Received: _____

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

Refer to instructions 46 and 47 and consider your instructions as a whole.

/S/ Larry A. Jordan

JUDGE

Date and Time Returned to Jury: 10/25/94 12:00 PM

SUPERIOR COURT OF WASHINGTON

COUNTY OF KING

[Caption Omitted In Printing]

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY:

Request to rehear the testimony of Cesar Frasco Sarausad II.

DREW ANDERSON 27 OCT 94 11:44

FOREMAN DATE AND TIME

Date and Time Received: _____

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

Testimony will not be repeated.

/S/ Larry A. Jordan

JUDGE

Date and Time Returned to Jury: 10/27/94 1:30

SUPERIOR COURT OF WASHINGTON

COUNTY OF KING

[Caption Omitted In Printing]

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY:

Reference: Instruction No. 17 in "the crime of murder in the second degree (intentional)"

QUESTION: Does intentional apply to only the defendant or only his accomplice?

DREW ANDERSON 28 OCT 94 11:25 AM

FOREMAN DATE AND TIME

Date and Time Received: _____

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

Refer to instructions 45 & 46 and consider the instructions as a whole.

/S/ Larry A. Jordan

JUDGE

Date and Time Returned to Jury: 10/28/94 11:55 AM

SUPERIOR COURT OF WASHINGTON

COUNTY OF KING

[Caption Omitted In Printing]

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY:

We are having difficulty agreeing on the legal definition and concept of "accomplice".

QUESTION – when a person willing participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?

DREW ANDERSON 31 OCT 1994 14:42

FOREMAN DATE AND TIME

Date and Time Received: _____

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

Reread instructions #s 45, 46, 47, and 48 and consider your instructions as a whole.

/S/ Larry A. Jordan

JUDGE

Date and Time Returned to Jury: 10/31/94 3:06 PM

SUPERIOR COURT OF WASHINGTON

COUNTY OF KING

[Caption Omitted In Printing]

INQUIRY FROM
THE JURY AND
COURT'S RESPONSE

JURY INQUIRY:

We have reached a verdict for Brian Keith Ronquillo and Cesar Frasco Sarausad II.

We are unable to reach a verdict for Jerome Mark Reyes.

How do we proceed?

DREW ANDERSON 1 NOV 1994 10:40 AM

FOREMAN DATE AND TIME

Date and Time Received: _____

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

_____

JUDGE

Date and Time Returned to Jury: _____

KING COUNTY SUPERIOR COURT

Date: OCT 25 1994

[Caption Omitted In Printing]

Continued from Oct. 24, 1994

Minute Entry

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| The jury returns to the jury room to resume deliberations at 9:00 A.M.

| At 11:30 A.M., the jury sends out a written inquiry:

| Request clarification on instructions no. 11 & no. 12 element (3); does the "intent" apply to (the defendant only) or to (the defendant or his accomplice)?

| /s/ Drew Anderson, Foreman

| The court confers with respective counsel. Counsel for State and for Defendants Reyes and Sarausad appear in person. Counsel for Deft. Ronquillo indicates per telephone call that he will adopt the position of other defense counsel. Counsel for Deft. Reyes suggests a reply referring the jury to instructions 6, 46

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Minute Entry

and 47 as well as the instructions as a whole. At 12:00 P.M., the Court replies to the jury in writing: "Refer to instructions 46 and 47 and consider your instructions as a whole." Counsel for Deft. Reyes objects and excepts to the Court not including reference to instruction #6. Counsel for Defts. Sarausad and Ronquillo join in the objection.

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KING COUNTY SUPERIOR COURT

Date: OCT 27 1994

[Caption Omitted In Printing]

Continued from Oct. 26, 1994

Minute Entry

Defendants and respective counsel not present.

The jury returns to the jury room to resume deliberations. All jurors are present by 8:52 A.M.

At 11:44 A.M. the jury sends out a written inquiry:

"Request to rehear the testimony of Cesar Frasco Sarausad II"

/s/ Drew Anderson, Foreman

The jury breaks for lunch from 11:45 A.M. to 1:10 P.M.

The Court confers with respective counsel by telephone.

At 1:30 P.M., the Court replies in writing:

"Testimony will not be repeated."

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Minute Entry

The Court orders that the confidential Juror Questionnaire for each of the 100 prospective jurors in these cases be sealed.
At 3:50 P.M. the Bailiff, under the direction of the Court, excuses the jury for the day, to return and resume deliberations tomorrow at 9:00 A.M.

KING COUNTY SUPERIOR COURT

Date: OCT 28 1994

[Caption Omitted In Printing]

Continued from October 27, 1994

Minute Entry

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The jury returns to the jury room to resume deliberations at 8:55 A.M.

At 11:25 A.M. the jury sends out a written inquiry:

Reference: Instruction No. 17 in "the crime of murder in the second degree (intentional)"
Question: Does intentional apply to only the Defendant or only his accomplice?

/s/ Drew Anderson, Foreman

The court confers with respective counsel – counsel for State (Noonan) and for Deft. Reyes in person and for Defts. Sarausad and Ronquillo by telephone. Counsel for State and for Defts. Ronquillo and Reyes indicate no objection to the

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Minute Entry

| Court giving the same reply it gave to the
| jury's previous inquiry on Oct. 25, 1994.
| Counsel for Deft. Sarausad maintains the
| same objection it previously made orally and
| per his brief filed on that date.
| At 11:55 A.M. the court replies in writing:
| "Refer to instruction 45 and 46 and consider
| the instructions as a whole."

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KING COUNTY SUPERIOR COURT

Date: OCT 31 1994

[Caption Omitted In Printing]

Continued from October 28, 1994

Minute Entry

***

| At 2:42 P.M., the jury sends out a written inquiry:
| We are having difficulty agreeing on the legal definition and concept of "accomplice." Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?"
| /s/ Drew Anderson, Foreman

***

Page 2 of 2

Minute Entry

The court confers with respective counsel in person (State) and by telephone (Defts) and indicates its proposal reply.

Counsel for Deft. Ronquillo suggest "refer to your instructions", but has no objection to the court's proposed reply.

Counsel for Deft. Reyes suggests "see instruction 46 and consider your instructions as a whole", but has no obligation to the court's proposed reply.

Counsel for Deft. Sarausad suggest either

(1) "no"; or

(2) "reread instruction #46 (accomplice definition) with the added clarification: to be an accomplice one (1) must promote or facilitate the crime being considered by the actor, (2) the actor must have the mental state required for the crime, and (3) the accomplice must know that the actor had the required mental state.

Counsel for Deft. Sarausad objects to the court's proposed reply.

At 3:06 P.M. the court replies in writing: "Reread instructions #45, 46, 47, and 48, and consider your instructions as a whole."

***

CHAPTER 153–HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of

the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a

factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

PETITIONER'S BRIEF

94

(4)

FILED
MAY 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 07-772

IN THE SUPREME COURT OF THE UNITED STATES

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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6/16/05 63P

QUESTION PRESENTED

The Washington Supreme Court has repeatedly approved of the pattern accomplice liability jury instructions given in Sarausad's trial, which mirror the statutory language on accomplice liability under state law. The United States Court of Appeals for the Ninth Circuit found a violation of due process based on its independent conclusion that the instructions were ambiguous and that there was a reasonable likelihood a jury could misapply the instructions so as to relieve the prosecution of its burden to prove each element of a crime beyond a reasonable doubt.

1. In reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law governing accomplice liability?

2. Where the accomplice liability instructions correctly set forth state law, is it an unreasonable application of clearly established federal law to conclude there was no reasonable likelihood that the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all the elements of the crime?

PARTIES

The petitioner is Doug Waddington, the Superintendent of the Washington Corrections Center. Mr. Waddington is the successor in office to Carol Porter, who was the respondent-appellant in the Ninth Circuit, and he is substituted pursuant to Supreme Court Rule 35.3. The respondent is Cesar Sarausad.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Sarausad v. Porter*, 479 F.3d 671 (9th Cir. 2007). Pet. App. 31a–124a. The order denying a timely petition for rehearing en banc, and the dissent from the denial of rehearing is reported at 503 F.3d 822 (9th Cir. 2007). Pet. App. 1a–30a. The order of the United States District Court for the Western District of Washington is unpublished. Pet. App. 125a–33a. The report and recommendation of the United States Magistrate Judge is unpublished. Pet. App. 134a–88a. The opinion of the Washington Court of Appeals denying Sarausad's post-conviction collateral challenge is reported at *In re the Personal Restraint of Sarausad*, 109 Wash. App. 824, 39 P.3d 308 (2001). Pet. App. 195a–230a. The state court opinion affirming Sarausad's convictions on direct appeal is unpublished. Pet. App. 233a–67a.

JURISDICTION

The court of appeals first entered its opinion March 7, 2007. Pet. App. 31a. The circuit court denied a timely petition for rehearing en banc September 10, 2007. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution similarly provides, in part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

28 U.S.C. § 2254(e)(1) provides:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of

a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1)

Washington's accomplice liability statute, Wash. Rev. Code § 9A.08.020, provides, in relevant part:

> "(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> "(2) A person is legally accountable for the conduct of another person when:
>
> ". . . .
>
> "(c) He is an accomplice of such other person in the commission of the crime.
>
> "(3) A person is an accomplice of another person in the commission of a crime if:
>
> "(a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> "(i) solicits, commands, encourages, or requests such other person to commit it; or
>
> "(ii) aids or agrees to aid such other person in planning or committing it[.]" Wash. Rev. Code § 9A.08.020.

Washington's second degree murder statute, Wash. Rev. Code § 9A.32.050, provides, in relevant part:

> "(1) A person is guilty of murder in the second degree when:
>
> > "(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person[.]" Wash. Rev. Code § 9A.32.050.

STATEMENT

In 1994, a gang-related drive-by shooting occurred at a Seattle area high school. Respondent Cesar Sarausad drove quickly toward a group of students standing outside the school and then slowed his car in front of the students. As the car slowed, front-seat passenger Brian Ronquillo fired several shots at the students. Sarausad knew that Ronquillo was armed and that he was going to shoot. Melissa Fernandes was shot in the head and killed. Another student was wounded.

A jury convicted Sarausad of second degree intentional murder, second degree attempted murder, and second degree assault. The Washington appellate courts affirmed that the instructions in Sarausad's trial correctly set forth Washington law on accomplice liability. The Ninth Circuit held that the instruction that was given violated the Due Process Clause. The court concluded that the instruction was ambiguous with regard to accomplice liability under Washington law, that an additional clarifying instruction was required, and that there was a reasonable likelihood that the jury misapplied

the instruction in a manner that relieved the prosecution of its burden to prove all the elements of the crime. Sarausad's convictions for murder and attempted murder were vacated. (Sarausad's habeas corpus petition did not challenge the assault conviction.)

1. The Events Of The Shooting

Sarausad was a member of a gang called the *23rd Street Diablos*. Pet. App. 197a. On the day of the drive-by shooting, gang member Jerome Reyes told his fellow Diablos that two days earlier he had been chased away from Ballard High School by a rival gang, the *Bad Side Posse*. Pet. App. 197a. The Diablos considered the chasing of Reyes to be an affront to their gang requiring revenge to regain their lost respect. Pet. App. 216a. With Sarausad driving one of the two cars, Reyes, Ronquillo, and six other Diablos drove to the high school to confront the rival gang. Pet. App. 197a. At the school, the Diablos flashed gang signs, exchanged harsh words, and engaged in a shoving match with the rival gang. Pet. App. 197a, 236a. The Diablos, however, left the school when they heard the police were coming. Pet. App. 197a.

The group of Diablos then went to a friend's home. Pet. App. 197a. Sarausad left to get Michael Vicencio, whom the gang members knew had a gun. Pet. App. 34a, 51a. When Vicencio arrived at the house, he gave the gun to Ronquillo. Pet. App. 34a, 198a, 236a. The Diablos then returned to the high

school to show they were not afraid of the other gang. Pet. App. 236a. Sarausad drove the lead car andVicencio drove the second car. Pet. App. 198a. Ronquillo, armed with the gun, sat next to Sarausad, with three Diablos in the back seat. Pet. App. 198a.

While returning to the school, the Diablos in Sarausad's car discussed the possibility of shooting. Pet. App. 198a. As the two cars neared the school, they moved side by side to hold a brief discussion, where Sarausad said, "Are you ready?" Pet. App. 198a. As he sat next to Sarausad, Ronquillo tied a bandana over his nose and mouth, and pulled the gun out of his pants. Pet. App. 215a–16a. Sarausad drove quickly towards the front of the school and slowed the car in front of a group of students. Ronquillo aimed the gun out the front passenger window and fired between six and ten shots directly at the students. Pet. App. 198a. Two students ducked and avoided the shots, but a bullet hit Melissa Fernandes in the head, killing her. Pet. App. 198a. Another student was injured when he was hit in the leg by a bullet fragment. Pet. App. 198a.

Once the shooting stopped, Sarausad sped away, followed by the other car. Pet. App. 198a. After some distance, Ronquillo transferred the gun to the second car. Pet. App. 198a. Sarausad then drove to a local mall and eventually went home. Pet. App. 198a. The police arrested Sarausad at his home later that day. When arrested, Sarausad denied having even been at the school that day.

2. Trial Court Proceedings

a. The Charges Against Sarausad

In count one, the prosecution charged the driver Sarausad, the shooter Ronquillo, and the instigator Reyes with the first degree premeditated murder of Fernandes. J.A. 1. This charge contained within it the lesser-included offense of second degree intentional murder. Pet. App. 197a. Count two charged the alternative crime of second degree felony murder, but the jury could consider count two only if they did not convict on count one. J.A. 1–2; Pet. App. 196a n.3. The prosecution also charged the three defendants with the attempted murders of two of the students targeted during the shooting, and with the second degree assault of the student injured by bullet fragments. J.A. 2–4.

The three defendants were tried together. The prosecution's theory was that gang mentality required the Diablos to confront the rival gang to regain the respect lost when Reyes was chased from the high school. Pet. App. 199a. When the shoving match on the first trip to the school failed to serve this purpose, several witnesses showed how the defendants returned to the school intending to carry out the drive-by shooting as a certain means of regaining lost respect. Pet. App. 199a. Ronquillo's defense admitted he fired the gun, but denied he had any intent to kill. Pet. App. 199a. Sarausad's and Reyes's defense was that they returned to the school expecting, at most, more shoving or a fistfight. Pet. App. 199a. Sarausad denied knowing that Ronquillo was armed, and he claimed that no one in the car

saw Ronquillo pull out the gun and tie the bandana over his face before the shooting. Pet. App. 199a.

The court instructed the jury on all of the elements of each crime charged against Sarausad. J.A. 7–18. The court instructed that to convict Sarausad of second degree intentional murder, the jury must find each element of the crime beyond a reasonable doubt, including the elements that "Sarausad, or an accomplice discharged a firearm," and that "Sarausad, or an accomplice acted with intent to cause the death of another person." J.A. 10. Similarly, the court instructed that to convict Sarausad of attempted second degree murder, the jury must find beyond a reasonable doubt that Sarausad or his accomplice "did an act which was a substantial step toward the commission of Murder in the Second Degree," and "[t]hat the act was done with the intent to commit Murder in the Second Degree." J.A. 14, 15. The court specifically instructed the jury on the definitions of intent and knowledge. J.A. 17, 18. The instructions did not omit any element of the charged offenses.

The court also instructed the jury that it "must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant." J.A. 7. In each charge, the court specifically instructed the jury that to convict, each of the "elements of the crime must be proved beyond a reasonable doubt." J.A. 9–10, 12–16. The court instructed: "On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to

any one of these elements, then it will be your duty to return a verdict of not guilty." J.A. 9–10.

b. The Instructions On Accomplice Liability

The prosecution contended that Sarausad and Reyes were guilty as accomplices of Ronquillo. Under Washington law, an accomplice is guilty to the same extent as the principal in a crime. Wash. Rev. Code § 9A.08.020(1)–(2) (Pet. App. 274a). Washington law defines an accomplice as someone who "aids or agrees to aid such other person in planning or committing" the crime charged. Wash. Rev. Code § 9A.08.020(3) (Pet. App. 274a). Accomplice liability requires proof the person acted "[w]ith knowledge that it will promote or facilitate the commission of the crime" for which the accomplice is charged. Wash. Rev. Code § 9A.08.020(3) (Pet. App. 274a).

Sarausad proffered an instruction that added language to the definition of an accomplice. J.A. 20–21. The court declined to give the proposed instruction and, instead, used the pattern instruction quoting almost verbatim from the accomplice liability statute, Wash. Rev. Code § 9A.08.020. *Compare* Pet. App. 274a–275a (statute) *with* J.A. 16–17 (instructions 45 and 46). Instruction number 45 provided:

> "You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person

when he is an accomplice of such other person in the commission of the crime." J.A. 16.

The court also gave instruction number 46, providing, in relevant part:

> "A person is an accomplice in the commission of *a crime* if, *with knowledge that it will promote or facilitate the commission of the crime,* he or she either:
>
> "(1) solicits, commands, encourages, or requests another person to commit *the crime* or
>
> "(2) aids or agrees to aid another person in planning or committing *the crime.*
>
> "The word 'aid' means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." J.A. 17 (emphasis added.)

Under Washington law, these are the proper jury instructions on the knowledge element of accomplice liability. *See State v. Roberts*, 142 Wash. 2d 471, 512, 14 P.3d 713 (2000). The Washington Supreme Court in *Roberts* held the accomplice statute does not impose strict liability on an alleged accomplice for any crime that might be committed by a principal. *Id.* at 510. The statute imposes a mens

rea requirement that the accused act with knowledge that he is promoting or facilitating "the crime," which means the charged offense. *Roberts*, 142 Wash. 2d at 510. However, the mens rea element of knowledge does not require that the accomplice share the same mental state as the principal. Instead, the "long-standing rule [is] that an accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *Id.* at 512 (citing *State v. Sweet*, 138 Wash. 2d 466, 479, 980 P.2d 1223 (1999); *State v. Hoffman*, 116 Wash. 2d 51, 104, 804 P.2d 577 (1991)). "[W]here criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice's *general knowledge of his coparticipant's substantive crime*." *Roberts*, 142 Wash. 2d at 512 (quoting *State v. Rice*, 102 Wash. 2d 120, 125, 683 P.2d 199 (1984)).

Roberts disapproved of an instruction stating that an accomplice must act with knowledge that he promoted or facilitated the commission of "a crime." *Roberts*, 142 Wash. 2d at 512–13. The "a crime" instruction in *Roberts* improperly departed from the language of the statute. *Id.* at 511. However, the *Roberts* court expressly approved an instruction that required the jury to find "the accomplice acted 'with knowledge that it will promote or facilitate the commission of *the crime*.'" *Id.* at 512 (quoting jury instruction in *State v. Davis*, 101 Wash. 2d 654, 656, 682 P.2d 883 (1984)); *see also State v. Cronin*, 142 Wash. 2d 568, 579, 14 P.3d 752 (2000). *Roberts* held the proper instruction referring to "the crime" would copy "exactly the language from the

accomplice liability statute" found at Wash. Rev. Code § 9A.08.020(3). *Roberts*, 142 Wash. 2d at 512.

c. The Closing Argument

The jury heard closing arguments after receiving the instructions. The prosecution argued that all three defendants were guilty of first degree murder, and attempted first degree murder, because they acted with premeditated intent to kill (J.A. 43–48), and that they had premeditated intent, even if they formed the intent to kill as late as when the two cars were stopped side by side near the school. J.A. 44. The prosecutor repeatedly contended that the defendants intended to shoot and kill because "[s]hoving wasn't going to regain their respect, a gun was. And that's why they went back for a second trip." J.A. 45. According to the prosecutor, Sarausad was a "classic accomplice" because he knowingly facilitated the murder by driving toward the students in a "swooping motion," and "slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up." J.A. 39. The prosecutor focused repeatedly on how all three defendants intended or knew that a shooting would occur. J.A. 41 ("They all knew what they were there for.").

Sarausad's counsel argued that Sarausad intended only a fistfight and did not know that Ronquillo was armed and intended to shoot. J.A. 80–82. "There is not a single circumstance, though, that points conclusively to [Sarausad] having any guilty knowledge or intent to assist in a shooting anywhere in the evidence." J.A. 82–83. Citing the

legal definition of an accomplice, counsel argued that Sarausad did not knowingly assist Ronquillo in committing "the crime being charged." According to defense counsel, "if [Sarausad] *didn't know* of any plan to use the gun, he's not guilty since the gun was used in all the crimes and all the lesser crimes. And the burden is on the State to prove that Cesar is an accomplice beyond a reasonable doubt." J.A. 84 (emphasis added).

Reyes's counsel also argued that Reyes was not an accomplice because he did not know Ronquillo was armed and intended to shoot. J.A. 68–72. He argued that Reyes, and Sarausad, and the others in the car were surprised when Ronquillo started shooting. J.A. 68–69. Focusing on knowledge, Reyes's counsel argued "there is no evidence at all that Jerome Reyes was anything other than present at the scene . . . [t]here is no evidence that he even knew that there was a gun." J.A. 74.

In rebuttal, the prosecutor again argued that Sarausad acted as an accomplice by knowingly assisting Ronquillo in the shooting:

> "When they rode down to Ballard High School that last time, I say they knew what they were up to. *They knew they were there to commit a crime, to disrespect the gang, to fight, to shoot, to get that respect back.* A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar." J.A. 123–24 (emphasis added).

d. Inquiries From The Jury

Jury deliberation followed the argument. On the third day of deliberations, the jury submitted an inquiry requesting "clarification on instructions No. 11 & 12 element (3); does the 'intent' apply to (the defendant only) or to (the defendant or his accomplice)?" J.A. 126. The court conferred with all counsel, and Reyes suggested referring the jury to instructions 6, 46, and 47, and the instructions as a whole. J.A. 131–32. The court responded: "Refer to instructions 46 and 47 and consider your instructions as a whole." J.A. 126.

Three days later, the jury submitted another inquiry referencing "[i]nstruction No. 17 in 'the crime of murder in the second degree (intentional).' QUESTION: Does intentional apply to only the defendant or only his accomplice?" J.A. 128. Over Sarausad's objection, the court responded: "Refer to instructions 45 and 46 and consider the instructions as a whole." J.A. 128.

Three days later, the jury submitted another inquiry:

> "We are having difficulty agreeing on the legal definition and concept of 'accomplice.' QUESTION – when a person willing [sic] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?" J.A. 129.

The court conferred with counsel. J.A. 138. Ronquillo and Reyes each suggested language that the jury should refer to their instructions, but neither defendant had an objection to the court's

proposed response. J.A. 138. Sarausad objected and suggested the following response:

> "(1) 'No'; or (2) reread instruction #46 (accomplice definition) with the added clarification: to be an accomplice one (1) must promote or facilitate the crime being considered by the actor, (2) the actor must have the mental state required for the crime, and (3) the accomplice must know that the actor had the required mental state." J.A. 13.

The court rejected Sarausad's proposed language and told the jury: "Reread instructions #45, 46, 47, and 48, and consider your instructions as a whole." J.A. 138.

e. The Verdict

The jury convicted Ronquillo on one count of first degree murder, two counts of attempted first degree murder, and one count of second degree assault while armed with a firearm. Pet. App. 197a. The jury convicted Sarausad of the lesser-included offenses of second degree (intentional) murder, attempted second degree murder, and second degree assault while armed with a firearm. Pet. App. 197a. The jury did not consider whether Sarausad was guilty of second degree felony murder because it convicted him of second degree intentional murder. Pet. App. 196a n.3. Because the jury could not reach a verdict as to Reyes, the court declared a mistrial as to him. Pet. App. 197a.

3. State Appellate Court Proceedings

The Washington Court of Appeals affirmed Sarausad's convictions on direct appeal, rejecting,

inter alia, Sarausad's challenge to the accomplice liability instructions. Pet. App. 233a–67a. The court noted the instructions mirrored the accomplice liability statute. Pet. App. 256a–58a. The court, however, stated an improper standard for accomplice liability. In finding sufficient evidence to support the convictions, the court incorrectly stated that to convict Sarausad, the prosecution need not prove he knew Ronquillo had a gun, or that there was even a potential for gun play. Pet. App. 266a. The Washington Supreme Court denied Sarausad's direct appeal without comment in October 1998. Pet. App. 231a–32a.

Subsequently, the Washington Supreme Court issued *Roberts* and *Cronin*, addressing the mens rea element of accomplice liability and reaffirming the proper instruction for accomplice liability under state law. *Roberts*, 142 Wash. 2d at 509–13; *Cronin*, 142 Wash. 2d at 579. Sarausad then filed a personal restraint petition, contending that while the instructions complied with *Roberts*, the court should have given an additional instruction clarifying the knowledge requirement for accomplice liability. Pet. App. 195a. Recognizing it had not correctly evaluated the issue on direct appeal, the Washington Court of Appeals again reviewed the jury instructions, this time applying *Roberts* and *Cronin*. Pet. App. 195a–230a. The court noted that to convict Sarausad as an accomplice, the jury had to find he acted with knowledge that his conduct would promote or facilitate "the crime" for which he was charged. Pet. App. 201a (citing *Roberts*, 142 Wash. 2d at 513; *Cronin*, 142 Wash. 2d at 579).

Rejecting Sarausad's argument that he must have possessed the same mental state as Ronquillo to act as an accomplice, the court of appeals ruled "an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime." Pet. App. 202a. "'The crime' means the charged crime, but because only general knowledge is required, even if the charged crime is aggravated, premeditated first degree murder as it was in *Roberts*, 'the crime' for purposes of accomplice liability is murder, regardless of degree." Pet. App. 202a–03a. The court of appeals explained that "the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide[.]" Pet. App. 204a. However, the court of appeals emphasized that an accomplice "need not have known that the principal had the kind of culpability required for any particular degree of murder." Pet. App. 204a.

Accordingly, the Washington Court of Appeals held the instructions given in Sarausad's trial complied with *Roberts* and the accomplice liability statute. Pet. App. 206a–07a. The instructions required the jury to find that Sarausad acted with knowledge that his conduct would promote or facilitate "the crime" of murder.

The court of appeals also rejected Sarausad's argument that the prosecutor's use of the catchphrase "in for a dime, in for a dollar" during the argument had erroneously urged guilt based on

lesser knowledge than required for accomplice liability, such as knowledge that the accused was facilitating a fistfight. Pet. App. 208a–09a. First, the court of appeals concluded that Sarausad's argument misstated the record. Pet. App. 209a. The court found that "the prosecutor did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a fist fight, he nevertheless was guilty of murder." Pet. App. 213a. Instead, the prosecutor argued that, in order to restore the gang's respect, Sarausad and the other Diablos went to the high school on the second trip with the knowledge and intent to shoot. Pet. App. 213a. Second, the court of appeals found no prejudice even if the prosecutor's hypothetical scenarios were improper. The court concluded that "Sarausad was not prejudiced . . . *because the court properly instructed the jury as to the law of accomplice liability* and because the prosecutor made it crystal clear to the jury that the State wanted Sarausad found guilty of [murder and assault] because he knowingly facilitated the drive-by shooting and for no other reason." Pet. App. 215a. The court of appeals stated that "[n]ot once did the prosecutor suggest to the jury that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight[.]" Pet. App. 214a–15a.

The Washington Supreme Court again denied review, affirming the Washington Court of Appeals. Pet. App. 191a.

4. Federal Court Proceedings

Sarausad filed a habeas corpus petition under 28 U.S.C. § 2254, challenging his convictions for murder and attempted murder, but not his conviction for second degree assault. The magistrate judge recommended relief on two grounds: (1) the evidence was insufficient; and (2) the jury instructions relieved the State of its burden of proof. Pet. App. 134a–88a. The district court granted the writ on both grounds. Pet. App. 125a–33a. The State appealed, and Sarausad cross-appealed.

A divided panel of the Ninth Circuit reversed the district court's ruling that the evidence was insufficient to support the convictions. Pet. App. 39a–53a. However, it affirmed the grant of relief on the jury instruction claim, concluding that "ambiguous jury instructions on accomplice liability, in combination with other factors, unconstitutionally relieved the State of its burden of proof of an element of the crimes with which [Sarausad] was charged." Pet. App. 32a. The circuit court concluded that this was inconsistent with clearly established federal law in *In re Winship*, 397 U.S. 358 (1970), *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Estelle v. McGuire*, 502 U.S. 62 (1991). Pet. App. 53a–54a.

The majority concluded that the accomplice liability instruction given in Sarausad's case was similar to the instructions that the Washington Supreme Court invalidated in *Roberts*. Pet. App. 70a. The majority faulted the state court adjudication of Sarausad's personal restraint petition for failure to require an additional "explicit statement" regarding knowledge. Pet. App. 69a. The

majority rejected the state court's reliance on the fact that the instructions track the statutory language exactly, concluding that the statutory language was ambiguous regarding the required showing of accomplice knowledge. Pet. App. 71a–72a. The majority reasoned that this "confusion" in the statute and instructions allowed conviction without proof beyond a reasonable doubt of the requisite knowledge. Pet. App. 74a.

The Ninth Circuit cited three other factors why the state court should have found a reasonable likelihood that the instructions were applied by the jury to shift the burden of proof from the prosecution: (1) the prosecutor argued for the wrong standard of accomplice liability (Pet. App. 76a), (2) the jury had asked questions to the judge that indicated confusion over what the State was required to prove for accomplice liability (Pet. App. 76a), and (3) the evidence of accomplice liability was "thin" (Pet. App. 75a).

Judge Bybee dissented from the panel majority. Pet. App. 99a–101a. The Ninth Circuit denied the State's petition for rehearing en banc. Pet. App. 1a. Judge Callahan wrote for the five judges who dissented from the denial of rehearing. Pet. App. 2a–30a.

SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act (AEDPA) prohibits habeas corpus relief on a claim adjudicated on the merits in state court where the state court decision was not contrary to or an unreasonable application of clearly established federal law, and was not based on an unreasonable

determination of the facts. 28 U.S.C. § 2254(d). In reviewing a state court decision under AEDPA, the federal courts must accept state court determinations of state law. The Ninth Circuit erred by rejecting the state court determination that the accomplice liability instructions correctly set forth state law and by concluding the state trial court should have given an additional instruction to further explain the state law on accomplice liability.

Based on its erroneous review of the adequacy of the instructions under state law, the Ninth Circuit held that the accomplice liability instructions violated the Due Process Clause because they were so ambiguous that they permitted the State to convict Sarausad without proving every element of the crime beyond a reasonable doubt. The Ninth Circuit concluded that the State was relieved of the burden to prove beyond a reasonable doubt that Sarausad had knowledge that he was facilitating or promoting a drive-by shooting. For a jury instruction to violate due process, Sarausad must establish not merely that the instruction is undesirable or erroneous, but that it violated some right guaranteed to the defendant by the Fourteenth Amendment. The question in such a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. Sarausad did not satisfy his burden of showing a due process violation, and he did not satisfy his burden under AEDPA of showing the state court unreasonably applied clearly established federal law. Under the Court's holdings, the state court could reasonably conclude that the instructions correctly setting forth state law did not violate due

process by relieving the State of the burden of proof. The instructions did not omit an element of the offense, did not create a presumption of fact, and did not shift the burden of proof to the defendant. The instructions correctly informed the jury of Washington law. Nothing in the holdings of this Court put the state courts on notice that the instructions given in Sarausad's trial violated due process by virtue of ambiguity.

The external factors relied on by the Ninth Circuit do not support its conclusion that the accomplice liability instruction was ambiguous or that there was a reasonable likelihood of misapplication by the jury. First, contrary to the Ninth Circuit's conclusion, the prosecutor's closing argument consistently argued that Sarausad was an accomplice because he knew that the gang was returning to the school to perform a drive-by shooting. The prosecutor did not argue for liability based merely on knowledge that the gang was going to engage in a fistfight. The state court conclusion that the prosecutor's argument did not cause the jury to misapply the instruction is also confirmed by the closing arguments of defense counsel, who argued that their clients were not accomplices because they did not know that there would be a shooting. Second, the fact that the jury asked for clarification of the jury instructions does not prove that the jury was confused. The trial judge correctly respond to the jury's questions by referring them to the instructions. One must assume that because it did not seek further clarification, the jury ultimately understood the instructions. Finally, the Ninth Circuit's reliance on its perception that the evidence against Sarausad

was thin is belied by the court's decision reversing the district court, and holding that the state court reasonably concluded that the evidence was sufficient to prove Sarausad's guilt beyond a reasonable doubt.

Sarausad did not show the state courts unreasonably applied clearly established federal law in adjudicating his jury instruction claim. By affirming the grant of habeas relief, the Ninth Circuit failed to give the proper deference required under AEDPA.

ARGUMENT

1. Habeas Relief Is Barred If The State Court Decision Was A Reasonable Application Of Clearly Established Federal Law

The Antiterrorism and Effective Death Penalty Act (AEDPA) limits the power of the federal courts to grant habeas corpus relief to state prisoners. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). AEDPA prohibits relief on a claim adjudicated on the merits in state court where the state court decision was not contrary to or an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established federal law under § 2254(d)(1) only if the "state court arrives at a conclusion opposite to that reached by this Court on a question of law," or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court

precedent and arrives at a result opposite to ours." *Williams*, 529 U.S. at 405. To fall within the "contrary to" clause, the state court decision "must be substantially different from the relevant precedent of this Court." *Id.* "[A] run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* at 406. Where an alleged error is the manner in which the state court applied federal law, the case does not fall within the "contrary to" clause of 28 U.S.C. § 2254(d)(1). *Id.* at 407.

A state court decision is an unreasonable application of clearly established federal law under § 2254(d)(1) only if the state court unreasonably applies the holdings of this Court to the facts of the prisoner's case. *Holland v. Jackson*, 542 U.S. 649, 652 (2004). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Even "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* For a federal court to grant relief, the state court decision must be objectively unreasonable. *Id.* at 75–76. Whether a decision is objectively unreasonable depends upon the specificity of the rule. "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

AEDPA thus imposes a "'highly deferential standard for evaluating [a] state-court ruling.'" *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam); *see also Brown v. Payton*, 544 U.S. 133, 141–47 (2005); *Bell v. Cone*, 543 U.S. 447, 455 (2005). The statute "demands that state-court decisions be given the benefit of the doubt." *Woodford*, 537 U.S. at 24. "[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Id.*

2. The Ninth Circuit Erred In Failing To Accept The State Court Determination That The Accomplice Liability Instruction Accurately Reflected Washington Law

The Ninth Circuit held that instructions 45 and 46 on accomplice liability were improper because they were "almost identical" to the accomplice liability instruction that the Washington Supreme Court invalidated in *State v. Roberts*, 142 Wash. 2d 471, 512, 14 P.3d 713 (2000). Pet. App. 70a. As a result, the majority ruled that the state must provide an additional instruction for accomplice liability. Pet. App. 69a, 71a. Sarausad abandons this part of the Ninth Circuit holding. In his brief in opposition, Sarausad agrees that his "jury was instructed in the language of Washington's accomplice liability statute, Wash. Rev. Code. § 9A.08.020" and the instructions did not, "in and of themselves, give rise to a constitutional violation." Br. Opp. 2, 12.

The Ninth Circuit's conclusion that instructions 45 and 46 misstate the accomplice intent element of Washington law is flawed for two reasons. First, in reviewing a state court decision under AEDPA, the federal courts may not second-guess state court determinations of state law. *Uttecht v. Brown*, 127 S. Ct. 2218, 2231 (2007). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67–68.

For example, in *Bradshaw v. Richey*, 546 U.S. 74 (2005), this Court held that the Sixth Circuit erred when it disregarded the Ohio Supreme Court's ruling that transferred intent was a permissible basis for a murder conviction. A "state court's "interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Id.* at 76; *see also Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 629 (1988) (federal courts "are not at liberty to depart from the state appellate court's resolution of these issues of state law"); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (elements of a state crime are necessarily established by state law); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (state courts are the ultimate expositors of state law and what constitutes the elements of a crime under a state statute); *Martin v. Ohio*, 480 U.S. 228, 235 (1987) (same); *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977); *Cupp v. Naughten*, 414 U.S. 141, 143 (1973).

Here the Ninth Circuit erroneously disregarded the state court interpretations of state law by conducting an independent examination of

whether the instructions accurately reflect state law. For example, the circuit court states that instructions 45 and 46 in Sarausad's trial were "very similar" to instructions held invalid by the Washington Supreme Court in *Roberts*, noting that the instructions began with reference to "a crime." Pet. App. 69a–70a. The circuit court's concern with the phrase "a crime" in the introductory sentence of instructions 45 and 46 exceeds the scope of habeas corpus review, because it ignores the authoritative interpretation of the Washington courts that the instructions complied with *Roberts*.

The second flaw in the Ninth Circuit's reasoning is that it wrongly interpreted state law. The Washington courts specifically ruled that the instructions in Sarausad's trial correctly instructed the jury on state law and fully set forth the elements of accomplice liability. Pet. App. 191a, 201a–15a. The instructions mirrored the state's accomplice liability statute, differing only in using the word "it," while the instructions used the words "the crime." *Compare* J.A. 16–17 *with* Pet. App. 274a. The same pattern instructions had been approved by the Washington Supreme Court prior to the trial. *See State v. Davis*, 101 Wash. 2d 654, 656–59, 682 P.2d 883 (1984). The same instructions were cited with approval following the trial in *Roberts*, 142 Wash. 2d at 509–13. As Judge Callahan noted in dissent, "[n]o Washington court has ever disapproved of a jury instruction that tracked the exact language of section [Wash. Rev. Code §] 9A.08.020." Pet. App. 11a. "Every decision examining the jury instructions given in Sarausad's case, as well as [Wash. Rev. Code] § 9A.08.020, has determined that the

instruction adequately and properly informs the jury of the intent necessary to find criminal liability under Washington law." Pet. App. 12a–13a. The instructions did not omit an element of the offense, create a presumption, reduce the burden of proof, or shift the burden to the defendant. Pet. App. 15a. As Judge Callahan recognized, "Washington law clearly holds that the jury instruction in this case was a proper statement of Washington's accomplice liability law." Pet. App. 13a.

Moreover, the Ninth Circuit was incorrect in concluding that the term "a crime" in the accomplice instruction is constitutionally problematic; it is used in the introductory sentence of the statutory definition of an accomplice. Wash. Rev. Code § 9A.08.020. Because accomplice liability can be applied to all crimes committed in Washington, the statute and the instructions necessarily state that a person can be guilty of "a crime" when he or she acts as an accomplice in the commission of "the crime." Wash. Rev. Code § 9A.08.020(1), (2)(c), (3). *Roberts*, 142 Wash. 2d at 509–13. As explained by Judge Bybee in dissent, the erroneous use of "a crime" discussed in *Roberts*, 142 Wash. 2d at 508–13, does not exist in Sarausad's instructions. Instead, as the Washington Supreme Court has ruled, instructions 45 and 46 "correctly instructed the jury that it could convict Mr. Sarausad of murder or attempted murder as an accomplice only if it found he knowingly aided in the commission [of] 'the' crime charged." Pet. App. 191a.

The Ninth Circuit compounded its flawed review of state law by concluding that the state courts should have required "an explicit statement

that an accomplice must have *knowledge of the actual crime the principal intends* to commit." Pet. App. 69a (emphasis added). According to the panel opinion, due process required the instructions to contain a sentence specifying that the accomplice is guilty of "a crime" only when that person "knows that 'a crime' is 'the crime' the principal intends to commit." Pet. App. 71a. This demand for an additional instruction is flawed for three reasons.

First, a federal court sitting in habeas corpus, does not exercise supervisory power over the state courts, and it cannot require state courts to use particular language in an instruction when the language is not commanded by statute or the Constitution, even if language might be judicially desirable. *See Cupp*, 414 U.S. at 146–47. In reaching its conclusion that state law was so ambiguous that it required a narrowing and clarifying gloss, the Ninth Circuit relied on *Staples v. United States*, 511 U.S. 600 (1994), *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Liparota v. United States*, 471 U.S. 419 (1985). Pet. App. 72a–74a. However, these cases are inapposite because they concern the construction of federal statutes that were silent on mens rea, and not the requirements of due process applicable to state statutes. *See Staples*, 511 U.S. at 604–09; *Ratzlaf*, 510 U.S. at 138–49; *Liparota*, 471 U.S. at 423–34. This Court has never held that due process requires the States to adopt a particular standard of mens rea with respect to accomplice liability or to use particular language when instructing a jury on that element of a criminal charge. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("the Constitution does not require that any

particular form of words be used in advising the jury of the government's burden of proof").

States play the preeminent role in preventing and dealing with crime, and States possess primary authority for defining and enforcing the criminal law. *Patterson*, 432 U.S. at 210; *Martin*, 480 U.S. at 232; *Engle v. Isaac*, 456 U.S. 107, 128 (1982). "[I]t is normally within the power of the State to regulate procedures under which its laws are carried out," and the Court has declared it will "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986).

Thus, a federal court is not "a rulemaking organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 564 (1967). "[A] state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.'" *Spencer*, 385 U.S. at 564 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). For this reason, this Court has not required states to adopt particular instructions that the federal courts thought were wise. *Cupp*, 414 U.S. at 146–47 (Ninth Circuit did not have supervisory power to prohibit use of instruction by state court); *Henderson*, 431 U.S. at 153–57 (due process did not require additional instruction on element of causation); *Martin*, 480 U.S. at 233–35 (instructions involving self-defense to aggravated murder did not violate due process even though the instructions could have been clearer).

Second, no Washington court has required this specific sentence in accomplice instructions. The Washington courts have held that the accomplice need not share the same mental state as the principal, or have specific knowledge of every element of the crime committed by the principal. Pet. App. 201a–02a (citing *Roberts*, 142 Wash. 2d at 513; *Cronin*, 142 Wash. 2d at 579). The sentence proposed by the Ninth Circuit exceeds the elements of accomplice liability under Washington law.

Third, the "explicit statement" cited by the Ninth Circuit is inconsistent with the State's knowledge requirement. Washington does not require "knowledge of the actual crime the principal intends," as demanded by the circuit court. Pet. App. 69a. Washington requires only that the jury find Sarausad "acted with knowledge that his . . . conduct would *promote or facilitate* 'the crime' for which he [was] eventually charged." Pet. App. 201a (emphasis added) (citing *Roberts*, 142 Wash. 2d at 513; *Cronin*, 142 Wash. 2d at 579). Thus, the State did not have to prove that Sarausad had knowledge of every element of the crime committed by the principal, Ronquillo. Pet. App. 202a. The State did not have to prove Sarausad knew Ronquillo had the kind of culpability required for any particular degree of murder. Pet. App. 202a–04a. Under Washington law, the State had to show only that Sarausad knew generally that his conduct was promoting or facilitating a homicide. Pet. App. 204a–05a.

Under 28 U.S.C. § 2254(d)(1), the Ninth Circuit should have accepted the state court determination that the instructions fully and correctly set out state law governing the intent

element of accomplice liability. No clearly established rule of constitutional law, binding on the state courts, requires otherwise, and nothing requires the explicit sentence found lacking by the Ninth Circuit. *See* Pet. App. 112a (Bybee, J., dissenting) ("the majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts"). By conducting an independent examination of state law, and by concluding the proposed additional instruction is required, the Ninth Circuit exceeded its authority under 28 U.S.C. § 2254.

3. The State Courts Reasonably Concluded That The Accomplice Liability Instruction Did Not Deprive Sarausad Of Due Process

Sarausad claims that the accomplice liability instruction is ambiguous and, for that reason, violated his rights under the Due Process Clause. In reviewing an instruction that is allegedly ambiguous, the test is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde* v. *California*, 494 U.S. 370, 380 (1990)). The majority below concluded that there was a due process violation because the accomplice liability instructions were so ambiguous that they permitted the State to convict Sarausad without proving every element of the crime beyond a reasonable doubt. Specifically the Ninth Circuit concluded that the State had been relieved of the burden to prove beyond a reasonable doubt that Sarausad had

knowledge that he was facilitating or promoting a drive-by shooting.

a. The Ninth Circuit Ignored The High Burden Necessary To Establish A Due Process Violation

The majority below did not apply the high burden Sarausad must meet to establish his due process claim. This Court has repeatedly held that the mere alleged failure to correctly instruct a jury on state law does not rise to the level of a constitutional error requiring habeas corpus relief. *E.g.*, *Estelle*, 502 U.S. at 67; *Engle*, 456 U.S. at 119–21 & n.21; *Middleton v. McNeil*, 541 U.S. 433 (2004). In fact, outside of capital cases, this Court has "never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).[1]

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[1] Even in capital cases, the Court has repeatedly upheld against constitutional challenges jury instructions that correctly set forth the applicable state law. *Boyde v. California*, 494 U.S. 370 (1990) (instruction mirroring statute on consideration of mitigation evidence did not violate Eighth Amendment); *Brown v. Payton*, 544 U.S. 133 (2005) (state court reasonably concluded that an instruction using verbatim the text of California statute did not violate the Eighth Amendment); *Ayers v. Belmontes*, 127 U.S. 469 (2006) (instruction that followed statute governing consideration of mitigating factors did not violate the Eighth Amendment).

To obtain relief based on an allegedly erroneous instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp*, 414 U.S. at 146. "The question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Henderson*, 431 U.S. at 154 (quoting *Cupp*, 414 U.S. at 147). The burden of showing that an erroneous instruction was so prejudicial to support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. *Henderson* 431 U.S. at 154; *see also United States v. Frady*, 456 U.S. 152, 166 (1982); *Engle*, 456 U.S. at 134–35. As in *Henderson*, Sarausad's "burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation beyond the reading of the statutory language itself of the causation element." *Henderson*, 431 U.S. at 155. "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.*; *see also Holland v. United States*, 348 U.S. 121, 141 (1954) (refusal to give instructions on the wording of a statute was not prejudicial where the trial court "fully and correctly instructed the jury on every element of the crime").

Finally, because the constitutional issue is whether the instruction by itself rendered the entire trial fundamentally unfair, "the instruction 'may not

be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (quoting *Cupp*, 414 U.S. at 147). This standard recognizes "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp*, 414 U.S. at 147. The standard also recognizes that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380–81. "Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Id.* at 381.

b. The Ninth Circuit's Reliance On *Winship* And *Sandstrom* Is Misplaced

The majority relied on *In re Winship*, 397 U.S. 358 (1970), and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Pet. App. 53a–54a. Washington's accomplice liability instructions do not violate the holdings of these decisions. *Winship* held that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. As the *Cupp* Court recognized, *Winship* "was a different case from that before us now. There the trial judge made an express finding that the State was not required to

prove guilt beyond a reasonable doubt . . . ." *Cupp*, 414 U.S. at 148. As in *Cupp*, the State's burden of proof in Sarausad's trial "was emphasized and re-emphasized in the course of the complete jury instructions." *Id.* The burden was also repeatedly emphasized in the closing arguments of defense counsel. *See, e.g.*, J.A. 51–54, 110–14. Sarausad's instructions "by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under [Washington] law." *Cupp*, 414 U.S. at 148. The instructions did not violate *Winship*.

The Ninth Circuit's reliance on *Sandstrom* is also misplaced. *Sandstrom* is a descendent of *Winship*, but "it simply held that an instruction which creates a presumption of fact violates due process if it relieves the State of its burden of proving all of the elements of the offense charged beyond a reasonable doubt." *Gilmore*, 508 U.S. at 343; *see Sandstrom*, 442 U.S. at 512–26. Since the instructions here did not create a presumption of fact, the instructions did not violate *Sandstrom*.

c. Sarausad Has Not Satisfied The High Burden Imposed By The Due Process Clause

The decision below is incorrect because Sarausad has not satisfied the high burden required to show a due process violation, and he did not show that the state court adjudication was an objectively unreasonable application of clearly established federal law.

The majority below relied on *Estelle* (Pet. App. 54a) to find a constitutional error, but that

decision actually cuts against the Ninth Circuit's decision. *Estelle* dealt with an instruction that was allegedly erroneous under California law. The Court held that the instruction did not so infect the entire trial with unfairness as to violate due process. *Estelle*, 502 U.S. at 70–75. "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton*, 541 U.S. at 437. In reviewing whether the allegedly erroneous instruction violated due process, the Court has "'defined the category of infractions that violate "fundamental fairness" very narrowly.'" *Estelle*, 502 U.S. at 73. "'Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'" *Id.* at 73. While the instruction in *Estelle* was not as clear as it might have been, when viewed in context of the entire trial the instruction did not render Estelle's trial so fundamentally unfair so as to violate due process. *Id.* at 72–75.

Similarly, in *Middleton*, the Court summarily reversed the Ninth Circuit in an analogous case. The circuit court granted habeas relief because of one incorrect instruction on "imperfect self defense" notwithstanding the totality of the instructions. This Court held that this "conclusion failed to give appropriate deference to the state court's decision." *Middleton*, 541 U.S. at 437. The state court was entitled to weigh the impact of the incorrect instruction in light of the overall correct instructions. *Id.* at 438.

The Court has also rejected the notion that there is a due process violation when the state fails to give an additional instruction that the federal

deems wise. In *Cupp*, the Ninth Circuit found an instruction that every witness is presumed to speak the truth, although correct under Oregon law, relieved the State of the burden of proving every element of the crime. *Cupp*, 414 U.S. at 143–44. The Ninth Circuit found a *Winship* violation because the state trial court did not specifically cure the allegedly faulty instruction. *Id.* at 147. The circuit court's "analysis put the cart before the horse." *Id.* "[T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* *Winship* was different because "the trial judge made an express finding that the State was not required to prove guilt beyond a reasonable doubt . . . ." *Id.* at 148. In contrast, the Oregon "instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon law." *Id.* at 148. Because the jury was fully charged on the presumption of innocence and burden of proof, the theoretical tangential undercutting of such clearly stated propositions "is not of constitutional dimension." *Id.* at 149.

Similarly, in *Henderson*, the Second Circuit invalidated Kibbe's murder conviction by ruling the state court's failure to give a specific instruction defining the element of causation relieved the prosecution of the burden of proving every element of the offense of second degree murder. *Henderson*, 431 U.S. at 151. The Court explained that once the judge instructed the jury that all elements of the crime must be proved beyond a reasonable doubt, then an

objection predicated on *Winship* is "without merit." *Id.* at 154. *Henderson* rejects "the suggestion that the omission of more complete instructions on the causation issue 'so infected the entire trial that the resulting conviction violated due process.'" *Henderson*, 431 U.S. at 156–57. Even if "the jury might have reached a different verdict pursuant to an additional instruction, that possibility is too speculative to justify the conclusion that constitutional error was committed." *Id.* at 157.

In *Patterson v. New York*, 432 U.S. 197 (1977), the Court found no due process violation in a conviction where "the jury was instructed in accordance with the statute . . . ." *Patterson*, 432 U.S. at 206. The state statute defined the elements of murder as death, intent, and causation, and no facts were either presumed or inferred to constitute the crime. *Id.* at 205–06. Since the jury was instructed in the language of the statute, and the evidence was sufficient to prove the elements, "the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which (Patterson was) charged.'" *Id.* at 206.

Under the Court's holdings, the state court could reasonably conclude the instructions correctly setting forth state law did not violate due process by relieving the State of the burden of proof. The instructions did not omit an element of the offense, did not create a presumption of fact, and did not shift the burden of proof to the defendant. The instructions correctly informed the jury of Washington law. Nothing in the holdings of this Court put the state courts on notice that the

instructions given in Sarausad's trial violated due process by virtue of ambiguity. *See* Pet. App. 100a–01a, 115a–16a (Bybee, J., dissenting); *see also Smith v. Horn*, 120 F.3d 400, 425 (3d Cir. 1997) (Alito, J., dissenting) ("No Supreme Court case . . . has held that the Due Process Clause is violated whenever a state trial judge, in instructing a jury on the elements of a state offense, uses ambiguous language that prejudices the defendant."). Because the state court decision was not objectively unreasonable, relief is barred under 28 U.S.C. § 2254(d).

4. The Other Factors Relied Upon By The Ninth Circuit To Find A Due Process Violation Do Not Satisfy The Highly Deferential Standard Of Section 2254(d)(1)

The majority below also relied on three other factors to support its conclusion that there was a due process violation. In considering each of those factors, the majority failed to give proper deference to the state court adjudication. For this reason, the decision below must be reversed.

a. The State Court Reasonably Concluded The Prosecutor's Closing Arguments Did Not Cause The Jury To Misapply The Instructions

The Ninth Circuit placed significant weight on the prosecutor's closing argument and the state court adjudication that that argument did not cause the jury to misapply the instruction. In doing so, the Ninth Circuit erroneously disregarded the state court determination that the prosecutor's closing argument

was proper. Pet. App. 209a–14a. Specifically, the state court found the prosecutor did not argue that Sarausad was liable for murder if he merely thought Ronquillo intended a fistfight. Instead, having reviewed the record, the state court found that the prosecutor focused on Sarausad's knowledge that Ronquillo intended to shoot. Pet. App. 209a–14a. As the state court noted, the prosecutor argued:

> "'When they rode down to Ballard High School that last time, I say they knew what they were up to. They knew they were there to commit a crime, to disrespect the gang, to fight, *to shoot*, to get that respect back. A fist didn't work, pushing didn't work. Shouting insults at them didn't work. *Shooting was going to work. In for a dime, you're in for a dollar.*'" Pet. App. 212a (emphasis added).

The Ninth Circuit, however, concluded that the state court "misstated" the record and ignored portions of the prosecution's argument. Pet. App. 77a. This conclusion exceeds the scope of review under AEDPA.

"If the interpretation of the . . . remarks is deemed a legal issue, it is surely an issue of state law that the Court of Appeals should have accepted, since the views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). In light of the state court ruling that the argument did not misstate Washington law, the "constitutional violation found by the Court of Appeals dissolves." *Id.* Since the prosecutor did not misstate Washington law, her argument did not cause the jury

to misapply the correct instructions on accomplice liability.

In the alternative, if the state court determination is viewed as a determination of a factual issue, the Ninth Circuit again failed to give proper deference to this factual ruling. *Wainwright*, 464 U.S. at 84–85. Sarausad must rebut a state court determination of fact by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The record here supports the state court. It confirms that the prosecutor did not argue Sarausad would be guilty of second degree murder if he only intended to assist in a fistfight. Instead, the prosecution argued that all three defendants acted with premeditated intent to kill. J.A. 43–48. The prosecutor argued the defendants intended to kill because "[f]ists weren't going to regain respect. A gun was, in their eyes." J.A. 44. The prosecutor repeated this theme. "Shoving wasn't going to regain their respect, a gun was. And that's why they went back for a second trip. Mr. Ronquillo got that gun from Michael Vicencio." J.A. 45.

The prosecutor described Sarausad as a "classic accomplice," the "wheelman," who knowingly aided in the commission of murder by driving in a manner that facilitated the drive-by shooting. J.A. 39. The prosecutor pointed to evidence that Sarausad drove towards the students in a "swooping motion," and "slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up." J.A. 39.

The prosecutor argued that Sarausad knew what Ronquillo was going to do because there "was no hesitation, there was no stopping the car. There was no attempt for Mr. Sarausad to swerve his car out of the way so that innocent people wouldn't get shot. That was like clockwork. There was no hesitation. He sped off." J.A. 40. And after the shooting, the prosecutor argued that there "was no thought to getting rid of the shell casings. Nothing said to the defendant, Mr. Ronquillo, because there was nothing to say. Nobody asked him why he did it. *They all knew. They all knew what they were there for.*" J.A. 41 (emphasis added).

The prosecutor also argued that Sarausad knew Ronquillo was going to shoot because the Diablos had discussed shooting in the car prior to the shooting. J.A. 47. The prosecutor emphasized that shooting was what the defendants intended: "People have to go down so that the 23rd's can be respected, so be it. 'We've gotta shoot a gun to regain our power,' to be perceived as being tough, and Melissa Fernandes has to die, so be it. . . ." J.A. 49.

In rebuttal, the prosecutor again argued that Sarausad knowingly assisted Ronquillo in the shooting. The prosecutor stated: "When they rode down to Ballard High School that last time, I say they knew what they were up to. *They knew they were there to commit a crime, to disrespect the gang, to fight, to shoot, to get that respect back.*" J.A. 123 (emphasis added). The prosecutor emphasized that shooting was necessary, arguing that a "fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar." J.A. 123–24.

In light of the prosecutor's argument that Sarausad knew that there was going to be a shooting, he cannot meet his burden of rebutting the state court finding of fact by clear and convincing evidence as required by § 2254(d)(1).

The majority below faulted the state court's characterization of the prosecutor's argument, concluding the state court's incorrect description of the argument was "flatly contradicted by the record." Pet. App. 67a. To support this conclusion, the Ninth Circuit, quoted "only a small portion of the prosecutor's argument:"

> "Let me give you a good example of accomplice liability. A friend comes up to you and says, 'Hold this person's arms while I hit him.' You say, 'Okay, I don't like that person anyway.' You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, 'Well, I only intended this much damage to happen.' . . . The law in the State of Washington says, if you're in for a dime, you're in for a dollar." Pet. App. 67a (alteration in original).

The Ninth Circuit believed the "hold his arms" hypothetical misstated Washington law, and the circuit court believed the state court ignored this hypothetical when describing the prosecutor's argument as a correct statement of Washington law. Pet. App. 67a. However, as the Washington Court of Appeals stated, "[t]he 'hold his arms while I hit him' hypothetical may or may not be problematic under *Roberts*." Pet. App. 214a. The Washington Court of

Appeals noted the accomplice in the prosecutor's hypothetical might have been better charged with felony murder (as was Sarausad in count two), or he might also have knowingly facilitated the particular conduct that formed the basis of the charge. Pet. App. 214a. The Washington Court of Appeals correctly recognized that, regardless of whether the prosecutor's isolated hypothetical misstated the *Roberts* standard, "the prosecutor's accomplice liability arguments as a whole" (Pet. App. 214a) did not prejudice Sarausad.[2] Unlike the Ninth Circuit, which viewed portions of the argument in isolation, the Washington Court of Appeals correctly viewed the record as a whole in considering Sarausad's challenge to the instructions.

The majority's reliance on this small part of the closing argument is flawed because "whole context of the trial" must be considered in determining whether instructions, and the prosecutor's argument on such instructions, violated the Constitution. *Brown v. Payton*, 544 U.S. 133, 144 (2005). In *Brown*, the prosecutor argued, contrary to the law, that certain mitigating evidence should not

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[2] The jury's inability to reach a verdict as to Reyes shows the jury was not misled by the prosecution's argument. The prosecution's "hold his arms" hypothetical was directed at Reyes, being preceded and followed by arguments as to why Reyes was guilty as an accomplice to Ronquillo in the shooting. J.A. 38. If, as the Ninth Circuit concluded, this hypothetical was so egregious that it misled the jury to erroneously believe it could convict Sarausad as an accomplice if he merely expected a fistfight, then the jury would have also convicted Reyes. The fact the jury did not convict Reyes showed the jury followed the law and correctly applied the instructions given by the trial court.

be considered by the jury in the penalty phase of a capital case. The Court found no basis for relief under AEDPA because the argument came after the defense presented the mitigating evidence and the jury was properly instructed. *Brown*, 544 U.S. at 146.

Thus, even if the example that the majority singles out is inconsistent with state law, those statements were made in the course of an argument that consistently emphasized knowledge and intent. Further, the statements followed Sarausad's testimony where he attempted to show he did not know Ronquillo had a gun and intended to shoot. Moreover, the prosecutor's argument was followed by the arguments of both Reyes and Sarausad that the jury could not convict them unless they knowingly assisted Ronquillo in committing the crimes charged—the crimes of murder and attempted murder. J.A. 51–114.

Finally, defense counsel repeatedly emphasized that the jury could not convict either defendant if they did not know Ronquillo was armed and intended to shoot. Sarausad's counsel argued that Sarausad was not an accomplice to murder and attempted murder because he intended nothing more than a fistfight, and did not know that Ronquillo was armed and intended to shoot. J.A. 81–82. Counsel argued Sarausad was "simply caught up in a foolish macho taunting scheme that unexpectedly worsened severely when shooting erupted. There is not a

single circumstance, though, that points conclusively to his having any guilty knowledge or intent to assist in a shooting anywhere in the evidence." J.A. 82–83.

Reminding the jury of the legal definition of an accomplice, counsel argued that Sarausad was not an accomplice because he did not knowingly assist Ronquillo in committing "the crime being charged." J.A. 83–84. Counsel argued:

> "There is no question here that Cesar Sarausad assisted Brian Ronquillo. That's beyond dispute. [H]e drove him to the scene. The question is whether Cesar had knowledge that his assistance would promote or facilitate the crime of premeditated murder. That's the question for you. This could only have happened if Cesar knew that Brian Ronquillo had premeditated intent to murder someone. That's the only way." J.A. 83.

Counsel also emphasized that "the burden is on the State to prove that Cesar is an accomplice beyond a reasonable doubt." J.A. 84. He discussed the evidence at length, arguing it showed Sarausad did not know there would be a shooting. J.A. 85–108.

Reyes' counsel began his argument by cautioning the jury to look to the instructions regardless of what is represented by counsel, and by reminding the jury of the duty to accept the law as instructed by the court. J.A. 51–54. Reyes' counsel reminded the jury that it should

disregard any remark by counsel that is not supported by the evidence or the law as given by the court. J.A. 54–55. Reyes' counsel also reminded the jury of the prosecution's burden to prove every element of the crime beyond a reasonable doubt. J.A. 56–57. Counsel then urged the jury to pay particular attention to the instructions on accomplice liability, quoting instruction number 46. J.A. 57–58. Counsel argued extensively that Reyes was not an accomplice because he did not know Ronquillo was armed, and did not know Ronquillo was going to shoot. J.A. 68–72. Counsel argued that Reyes, like Sarausad and the others in the car, were surprised when Ronquillo started shooting. J.A. 68–69.

Referring to instruction number 46, Reyes' counsel argued that Reyes was not an accomplice because "there is no evidence at all that Jerome Reyes was anything other than present at the scene" and "no evidence that he even knew that there was a gun." J.A. 74.

Therefore, to the extent the prosecutor's argument at some point misstated accomplice liability, that misstatement is not constitutional error. As this Court has held, the "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Boyde* v. *California*, 494 U.S. 370, 384 (1990). Jurors are presumed to have followed their instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). The state court could therefore reasonably conclude the jury disregarded the prosecutor's argument to the extent the argument conflicted with the accomplice liability instructions. Pet. App. 214a.

As in *Brown*, it was not unreasonable for the state court to recognize that the correct instructions to the jury preclude finding error based on the prosecutor's statements. When viewing the trial as a whole, including the evidence and arguments presented by defense counsel, it was not unreasonable for the state courts to conclude the jury was not misled by any misstatements of the prosecution, but instead correctly understood that Sarausad must have knowingly assisted Ronquillo in committing "the crime" charged. *Brown*, 544 U.S. at 144–46.

b. The State Court Reasonably Applied Clearly Established Law When It Concluded The Trial Judge Correctly Responded To The Jury's Request For Clarification

The Ninth Circuit also relied on three inquiries from the jury about the instructions to support its conclusion that there was a reasonable likelihood that the jury had applied the accomplice instructions to relieve the prosecutor of the burden to prove knowledge according to state law. Pet. App. 76a–77a.

There are three reasons why these inquiries do not support the Ninth Circuit's conclusion that the accomplice liability instructions were ambiguous or that there was a reasonable likelihood of unconstitutional application of the instructions. First, the trial judge correctly responded to the jury inquiries by referring the jury to the instructions that correctly set forth state law. This is all that is required under the Constitution. As the Court

explained in *Weeks*, because the "jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, the question becomes whether the Constitution requires anything more. We hold that it does not." *Weeks*, 528 U.S. at 234.

Second, the Ninth Circuit's conclusion is based on conjecture, and conjecture should not be relied on in habeas review. *See Ayers v. Belmontes*, 127 U.S. 469, 479 (2006). The law presumes that the jury, having reread the instructions pursuant to the court's responses, understood and correctly applied the instructions. *Weeks*, 528 U.S. at 234. The state court adjudication cannot be faulted on this basis.

Third, the record in this case does not support the conclusion that the jury remained confused. Having submitted numerous jury inquiries, "[t]his particular jury demonstrated that it was not too shy to ask questions, suggesting that it would have asked another if it felt the judge's response unsatisfactory." *Weeks*, 528 U.S. at 235–36. As in *Weeks*, "[Sarausad's] jury did not inform the court that after reading the relevant paragraph of the instruction, it still did not understand its role." *Id.* at 234. Since the jury did not request further clarification, one must assume the jury understood the response. "To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer." *Id.*

In addition, counsel for Reyes and Sarausad referred to the instructions during closing arguments, repeatedly emphasizing to the jury that it must find Reyes and Sarausad knowingly assisted in the commission of "the crime" charged in order to convict them as accomplices. J.A. 51–114. That defense counsel argued at length, without objection, that the jury could not convict Sarausad and Reyes because they did not know Ronquillo was armed and going to shoot, "certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 494 U.S. at 384.

Similarly, the jury's inability to reach a verdict as to Reyes indicates the jury was not confused. The prosecution argued that both Sarausad and Reyes were guilty for knowingly aiding Ronquillo in the shooting. If, as Sarausad claims, the jury erroneously believed it could convict him as an accomplice if he merely expected a fistfight, then it would have also convicted Reyes. The fact the jury did not convict Reyes showed the jury followed the law and correctly applied the instructions given by the trial court.

Once the jury received the court's responses to the inquiries, the jury had not only the text of the instruction but also "its own recollection of defense counsel's closing argument for guidance." *Weeks*, 528 U.S. at 236. Not only is the challenged instruction just one of many instructions, "but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp*, 414 U.S. at 147. Here, the instructions correctly informed the jury about the

elements of accomplice liability, and defense counsel stressed these elements in closing argument. The state courts could reasonably conclude the instructions did not mislead the jury.

c. The Allegedly "Thin Evidence" Did Not Render The State Court Adjudication Unreasonable Since The Evidence Was Sufficient To Prove Sarausad's Guilt

Finally, the Ninth Circuit justified its conclusion that there was a reasonable likelihood that the jury misapplied the instructions to relieve the State of the burden of proof by describing the evidence of guilt as "thin." Pet. App. 75a–76a. To make this point, the Ninth Circuit disregarded the state court analysis of the evidence and simply concluded the state court overstated the strength of the prosecution's case. Pet. App. 75a. This reasoning gives no deference to the state court's view of the evidence, and it makes little sense in light of the Ninth Circuit's conclusion that the state court could reasonably conclude the evidence was sufficient to prove Sarausad guilty beyond a reasonable doubt. Because the state court could reasonably conclude the evidence presented at Sarausad's trial was sufficient for the jury to find the elements of the crime beyond a reasonable doubt, the state court could also reasonably determine that the evidence did not cause the jury to misapply the instruction.

CONCLUSION

For the reasons stated herein, the Court should reverse the decision of the Ninth Circuit and remand for further proceedings.

Respectfully submitted.

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RESPONDENT'S BRIEF

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DOUG WADDINGTON,

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v.

CESAR SARAUSAD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether it was objectively unreasonable for the state court to conclude that there was no reasonable likelihood the jury misunderstood the level of *mens rea* needed to find Cesar Sarausad guilty as an accomplice to murder where, after the jury repeatedly expressed confusion on this issue, reported that it was having difficulty agreeing on the definition of accomplice liability, and proposed an incorrect reading of the accomplice instructions:

(1) the trial court again directed the jury to "re-read" instructions on accomplice liability, as well as to read instructions on intent and knowledge, and to consider all other instructions in the case, but did not clarify the instructions;

(2) Washington courts, commentators, and the lawyers in closing arguments had construed the statute that mirrored the accomplice liability instructions in different and conflicting ways, which later required clarification by the Washington Supreme Court; and

(3) a correct understanding of the *mens rea* for accomplice liability was essential to resolve Sarausad's central defense to the State's thin evidence, at best, of alleged complicity in murder.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited in Petitioner's brief, the following constitutional provisions are involved:

U.S. Const. art. III § 2: "the trial of all crimes, except in cases of impeachment, shall be by jury."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

STATEMENT OF THE CASE

In 1975, the Washington Legislature enacted its current accomplice liability statute. Wash. Rev. Code § 9A.08.020(3). Under this statute, a person "is an accomplice of another person in the commission of a crime" if the person acts with knowledge that his or her conduct "will promote or facilitate the commission of the crime." *Id.* Twenty-five years later, a divided Washington Supreme Court clarified that this statutory language limited the scope of accomplice liability to persons who acted with "knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged," and rejected the State's argument that accomplice liability attaches "so long as the defendant knows that he or she is aiding in the commission of *any* crime." *State* v. *Cronin*, 14 P.3d 752, 757 (Wash. 2000) (en banc) (emphases in original); *State* v. *Roberts*, 14 P.3d 713 (Wash. 2000) (en banc).

Although the Washington Supreme Court has now clarified the meaning of the statute, its meaning in

the intervening years was not clear. After enactment in 1975, judges and counsel failed to recognize the significance of the language referring to "knowledge ... of the crime" as opposed to "a crime" and instructed juries that accomplice liability attached where a person had knowledge that his or her conduct would promote or facilitate "a crime." Wash Rev. Code. § 9A.08.020(3)(a); *State* v. *Boyde*, 586 P.2d 878, 886 (Wash. Ct. App. 1978). In 1984, the Washington Supreme Court itself assumed that a jury instruction that imposed liability for "knowledge ... of a crime" was consistent with Washington law. *State* v. *Rice*, 102 Wash. 2d 120, 124 (en banc) (1984). The Washington Supreme Court did so shortly after it upheld use of an instruction that referred to "knowledge of ... the crime." Br. at 11 (emphasis omitted) (citing *State* v. *Davis*, 101 Wn. 2d 883 (1994)).

Substituting "a" for "the" in jury instructions on accomplice liability became accepted in Washington practice. By 1994, the Washington Supreme Court Committee on Jury Instructions formally adopted the convention of using "a" instead of "the" in the state's criminal pattern jury instructions. 11 *Washington Pattern Jury Instructions-Criminal* 10.51 (2d ed. 1994). The practice was so entrenched that trial judges continued to instruct juries in this manner years after the Washington Supreme Court expressly disapproved of it. *State* v. *Wolff*, No. 30381-1-II, 2005 Wash. App. LEXIS 517, at *10 (Mar. 30, 2005) (noting that *Roberts* and *Cronin* were decided "two years prior to the trial in this case" where an erroneous accomplice instruction was used); see also *State* v. *Shott*, No. 54359-8-I, 2006 Wash. App. LEXIS 1033, at *11 (May 22, 2006) (per curiam) (incorrectly describing accomplice liability as "knowledge that

[conduct] will promote or facilitate the commission of a crime").

The trial in this case occurred in 1994, six years before the Washington Supreme Court's decisions in *Roberts* and *Cronin* clarified the *mens rea* required for accomplice liability. The direct appeal was decided in 1998, also prior to *Roberts* and *Cronin*. In the direct appeal, a unanimous appellate court misread the accomplice liability statute in precisely the manner the state supreme court would later reject. This case is before the Court because there is a reasonable likelihood that the jury in Sarausad's case similarly misunderstood the statute.

1. Factual Summary

On March 23, 1994, one student was killed and another wounded by a 16-year old, Brian Ronquillo, who fired shots from a car at Ballard High School in Seattle, Washington. Petitioner's Appendix ("Pet. App.") 196a, 198a, 238a. There is no dispute that Respondent Cesar Sarausad, then a 19-year-old freshman at the University of Washington, drove the car. Pet. App. 32a. The issue is whether, in driving Ronquillo and others to Ballard, Sarausad knew he was promoting or facilitating a murder.

Before college, Sarausad tutored other high school students in mathematics. Pet. App. 32a-33a. Through his tutoring, he met persons associated with a gang called the 23rd Street Diablos (referred to below as the "23rd" or the "Diablos"). Pet. App. 33a. The 23rd included, among others, Ronquillo and Sarausad's other co-defendant, Jerome Reyes. Pet. App. 33a.

On the morning of March 23rd, Sarausad met with Reyes, Ronquillo, and others. Pet. App. 235a. Reyes told the group that he had been chased away from

Ballard several days earlier by the Bad Side Posse ("the BSP"), a gang. Pet. App. 197a. The group decided to return to Ballard. Pet. App. 235a. Once there, they exchanged "words" with students and flashed gang signs from their cars. Pet. App. 136a. Several people, but not Sarausad, "eventually got out" of the cars. Pet. App. 236a. A "shoving match" accompanied by "harsh words" ensued. Pet. App. 136a.

Someone indicated police were nearby. Pet. App. 136a. The group left and traveled to a friend's home. *Id.* While outside, Ronquillo obtained a gun and put it in his pants. Pet. App. 34a. Sarausad was not present when Ronquillo obtained the gun. *Id.* Sarausad also was not present for a subsequent conversation about the possibility of a shooting. Pet. App. 45a.

After some time, the group left the house in two cars. Pet. App. 236a. Ronquillo rode in the front passenger seat of Sarausad's car. *Id.* Reyes and two others rode in the back. Pet. App. 136a. A few blocks from Ballard, the cars pulled next to each other. Pet. App. 34a. After a brief conversation, Sarausad said "[a]re you ready?," and the two cars proceeded to Ballard. Pet. App. 198a.

As the cars approached Ballard, a passenger in the backseat of Sarausad's car asked, "[a]re we going to cap?" Pet. App. 48a. Ronquillo started shooting before anyone could respond. Pet. App. 48a-49a. The cars then "sped away." Pet. App. 198a. Sarausad dropped off his passengers and returned home (*id.*), where he was arrested that day.

2. Sarausad's Trial

Ronquillo, Reyes, and Sarausad were charged and jointly tried for first-degree murder, second-degree

murder, attempted first-degree murder, and second-degree assault. Pet. App. 237a. The State argued that Ronquillo, the shooter, was the principal and that Sarausad and Reyes were his accomplices.

Sarausad's defense was that he was not an accomplice to murder because he did not know that Ronquillo or anyone else in the group had a gun or had planned a murder. Pet. App. 199a. Sarausad testified that he did not intend to facilitate a murder and returned to Ballard expecting no more than a fight. *Id.*

Though the State presented no direct evidence that Sarausad knew Ronquillo had a gun or knew of a plan to shoot BSP members (Pet. App. 265a), the State contended that Sarausad was a classic "wheelman" (Pet. App. 211a). It argued that Sarausad was affiliated with a gang and, therefore, would have knowingly participated in whatever the gang deemed necessary to protect its "honor." Pet. App. 216a. The State also argued that the manner in which he drove showed he intended to facilitate the shooting. *Id.*

3. The Jury Instructions

The court gave the jury 53 instructions. Instruction 12 defined the elements necessary to convict Sarausad of first-degree murder. Joint Appendix ("J.A.") 9. Instruction 17 defined the elements necessary to convict Sarausad of second-degree murder. Instruction 17 stated in pertinent part:

> To convict the defendant, Cesar Frasco Sarausad of the crime of murder in the second degree (intentional), a lesser included offense of Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

> (1) That on or about the 23rd day of March, 1994, the defendant, Cesar Frasco Sarausad, *or an accomplice* discharged a firearm;
>
> (2) That defendant, Cesar Frasco Sarausad, *or an accomplice* acted with intent to cause the death of another person;
>
> (3) That Melissa Ursula Fernandes died as a result of defendant, Cesar Frasco Sarausad's acts, *or the acts of an accomplice* ....

J.A. 10 (emphases added).

Instructions 45 and 46 tracked Washington's accomplice liability statute. Instruction 45 stated:

> You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

J.A. 16.

Instruction 46 stated:

> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word 'aid' means all assistance whether

> given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

J.A. 17.

Instructions 47 and 48 defined intent and knowledge for purposes of the accomplice liability instructions and the murder instructions. Instruction 47 stated:

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

Id.

Instruction 48 stated:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
>
> Acting knowingly or with knowledge also is established if a person acts intentionally.

J.A. 18.

Counsel for Sarausad and Reyes objected to the pattern jury instructions and joined in each other's objections. J.A. 22-29. Each submitted proposed

instructions that would have clarified the mental state required for accomplice liability. J.A. 21. Sarausad's attorney explained that the pattern instruction "is fine in most cases. But this is a special case. And I think the Court should take extra care to be sure that the jury understands the limits of accomplice liability." J.A. 27.

Counsel for Reyes further explained that the jury:

> should be advised that we don't simply accept the term accomplice because of a person's gang involvement.... I'm concerned that this jury may simply say, well, all right, you're a 23rd, they're responsible for anything any 23rd member does as an accomplice....

J.A. 23-24.

All of their objections were overruled. J.A. 24-25, 27-29.

4. The Closing Arguments

The closing arguments addressed the law of accomplice liability. After initial observations about the significance of gang membership and an exhortation to ignore the defendants' youth, the prosecutor announced that she was "not going to repeat all the facts," but instead would "talk to you about some of the legal principles, some of the instructions that the Court has given you on the law that applies in this case, because those particular instructions will be the most important in terms of guiding your deliberations through this case." J.A. 32.

The prosecutor asked the jury to focus on "two instructions," "number 45," and "another instruction right behind it which breaks down all the ways somebody can assist or aid in the commission of a

crime." J.A. 37. She then provided several illustrations of accomplice liability.

Her first illustration involved Reyes. It asserted a theory of accomplice liability that did not require any knowledge on Reyes' part of a gun, a potential murder, or even a crime. "Reyes, by setting the wheels in motion, by simply calling his friends, getting them together, saying, 'Let's go avenge this problem,' he's an accomplice." *Id.*

The prosecutor also offered "a good example of accomplice liability" that did not require knowledge of murder:

> A friend comes up to you and says, "Hold this person's arms while I hit him." You say, "Okay, I don't like that person, anyway." You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, "Well, I only intended this much damage to happen." Your presence, your readiness to assist caused the crime to occur and you are an accomplice. The law in the State of Washington says, if you're in for a dime, you're in for a dollar. If you're there or even if you're not there you're helping in some fashion to bring about this crime, you are just as guilty.

J.A. 38.

In response, both Reyes' and Sarausad's attorneys focused on the *mens rea* for accomplice liability. Reyes' attorney referred three times to Instruction 46 (accomplice liability) by its number and "urg[ed]" the jury to attend to it because it was "particularly acute" in this case. J.A. 56-57, 73-74. Among other arguments, he stressed that there was no evidence that Reyes knew of a gun. J.A. 74.

Sarausad's attorney then attempted to explain the minimum *mens rea* needed for accomplice liability:

> There is no question here that Cesar Sarausad assisted Brian Ronquillo. That's beyond dispute. [H]e drove him to the scene....
>
> With respect to every charged crime, Counts I through V, and the lesser included crime that you will be considering, ... the same question for you [is] did Cesar Sarausad have knowledge that his assistance in driving the car would promote or facilitate the charged crime or a lesser crime being charged. That's the question. He had such knowledge only if he knew that Brian Ronquillo would commit the particular crime being charged, whether it's murder one, attempted murder one or manslaughter. If he did not think any crime was planned, he's not guilty of anything but bad judgment. If he didn't know of any plan to use the gun, he's not guilty since the gun was used in all the crimes and all the lesser crimes.

J.A. 83-84. Sarausad's attorney then explained at length why this standard was critical to Sarausad's defense, given the lack of any evidence establishing that Sarausad knew that Ronquillo had a gun or intended to kill. J.A. 84-110. He then reminded the jury that if Sarausad "didn't know of a gun or plans for use of a gun for any purpose, he was not an accomplice under the instructions even as to manslaughter. Because he didn't have knowledge his own actions would promote or facilitate the crime." J.A. 110.

In rebuttal, the prosecutor disputed Sarausad's legal framework for accomplice liability by describing the law as it was commonly understood at the time –

that an accomplice need not have the specific intent to kill to be guilty of murder. She argued first that the defendants should "answer for their respective conduct" because each was a "but for" cause of the murders. J.A. 115. She spoke "about the accomplice liability instruction," expressly disagreeing with Sarausad's statement of the law and re-emphasizing her analogy to assault:

> And I've told you the old adage, you're in for a dime, in for a dollar. If their logic was correct, they're not ever an accomplice to anything. The getaway driver for a bank robbery would say, "I just told him to rob them, I didn't tell him to shoot him, I didn't do anything." The example I gave you earlier, "I just told my friend to hold the arms down of this person while he hit him, I didn't tell him to kill him, I'm not guilty of anything." If you're in for a dime, you're in for a dollar.

J.A. 123.

5. The Jury's Deliberations

During its deliberations, the jury submitted five questions to the judge, four of which related to Sarausad, and three of which related to the *mens rea* for accomplice liability.

A. *Jury's Second Question*[1]

On the third day of deliberations, the jury sent this inquiry about the first-degree murder instructions: "Request clarification on instructions No. 11 & No. 12 element (3); does the 'intent' apply to (the defendant

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[1] The jury's first request, on the second day of deliberations, was for a cassette tape player to listen to a 911 tape. Supplemental Appendix ("S.A.") 3.

only) or to (the defendant or his accomplice)?" J.A. 126, 131-32. Over the objections of Sarausad's counsel, the court responded as follows: "Refer to instructions 46 and 47 and consider your instructions as a whole." *Id.*

B. *Jury's Third Question*

Two days later, the jury asked "to rehear the testimony of Cesar Frasco Sarausad II." The court responded that: "Testimony will not be repeated." J.A. 127, 133.

C. *Jury's Fourth Question*

On its sixth day of deliberations, the jury asked about Sarausad's second-degree murder instruction: "Reference: Instruction No. 17 in 'the crime of murder in the second degree (intentional)[.]' QUESTION: Does intentional apply to only the defendant or only his accomplice?" J.A. 128, 135-36. Over defendants' objections, the court gave "the same reply it gave to the jury's previous inquiry" (J.A. 136) – to "[r]efer to instructions 45 & 46 and consider the instructions as a whole" (J.A. 128, 136).

D. *Jury's Fifth Question*

The jury conferred for another seven and one-half hours. It then reported difficulty agreeing on the *mens rea* standard for accomplice liability:

> We are having difficulty agreeing on the legal definition and concept of "accomplice". QUESTION: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?

J.A. 129, 137.

Sarausad's counsel proposed that the court either respond "no" or provide a supplemental instruction. J.A. 138. Over counsel's objections, the court responded: "Reread instructions #s 45, 46, 47, and 48 and consider your instructions as a whole." J.A. 129, 138.

The jury deliberated for another hour that day, and three more hours on the next (eighth) day of deliberations, before reaching verdicts on Ronquillo and Sarausad. J.A. 130.

6. Motions for New Trial and Reconsideration

The jury convicted Ronquillo of premeditated first-degree murder, first-degree attempted murder, and second-degree assault. It convicted Sarausad of second-degree murder, attempted second-degree murder (two counts), and second-degree assault. Pet. App. 234a. The jury was unable to reach a unanimous verdict as to Reyes. J.A. 130.

After the verdict, the jury met with defense counsel, prosecutors, and the judge. S.A. 25. Based on this discussion, Sarausad's counsel submitted declarations by two jurors and described the post-verdict statements of two others as evidence that the jury misunderstood the level of *mens rea* needed to convict Sarausad as an accomplice to murder. S.A. 25-27, 29-36.

One juror declared that "I and some of the other jurors believed that [Sarausad] never intended to see anyone killed or shot[,]" and "I did not believe that there was proof beyond a reasonable doubt that [Sarausad] even knew of the presence of a gun in the car or that he had knowledge of Ronquillo's intent to shoot a gun that day or to kill anyone." S.A. 32. Another juror stated that:

> We jurors found the jury instructions very confusing, particularly as they applied to Cesar.... We tried several times to get clarification from the judge as to how the "intent" requirement applied to Cesar. The main response we got was to "re-read instruction #46", the accomplice definition. We did re-read that instruction, along with others, but we remained confused, even after the verdict was announced in open court.

S.A. 35. The jurors described Sarausad's conviction as a "grave injustice." S.A. 33, 36.

7. Sarausad's Direct Appeal

On direct appeal, Sarausad argued that the facts were insufficient to support conviction and that the trial court failed to instruct and clarify for the jury that he was not an accomplice to murder unless he knew he was assisting a murder. Pet. App. 256a, 264a-65a. The State argued, based on settled law, that accomplice liability may properly be based on "knowledge that [the accomplice's] actions or presence will facilitate another in the commission of a crime[,]" meaning any crime. S.A. 39.

The Court of Appeals unanimously agreed with the State that "in Washington [accomplice liability] has been reduced to the maxim, 'in for a dime, in for a dollar.'" Pet. App. 235a. The court explained that "an accomplice, having agreed to participate in a criminal activity, runs the risk that the primary actor will exceed the scope of the preplanned illegality." Pet. App. 259a (quoting *Davis*, 101 Wn. 2d at 657-59). After having quoted the statute and jury instruction (Pet. App. 256a-58a), the court stated that "[a]n accomplice is criminally liable because of his intent to facilitate another in the commission of *a* crime" (*id.* at

265a) (emphasis added). The court therefore concluded that "it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day." Pet. App. 266a. Rather, it was sufficient that Sarausad "knew of the possibility of a fight—he agreed to participate in a gang confrontation." *Id.*

Sarausad's petition for review to the Washington Supreme Court was denied. Pet. App. 231a-32a.

8. Sarausad's Personal Restraint Petition And The State Courts' Subsequent Clarification of Washington Law

Sarausad filed his initial personal restraint petition ("PRP") in the Washington Court of Appeals. Building on the rejection of his direct appeal, he argued that trial counsel was ineffective precisely because he "predicated [his] entire defense on an erroneous interpretation of Washington's law on accomplice liability." S.A. 41. The petition explained that "Sarausad's theory at trial, as implemented by his trial attorney, ... was that Sarausad could not be guilty as an accomplice ... [because his] participation in a yelling match, even one that could lead to pushing and possibly blows, could not render him culpable for murder. This legal theory informed every aspect of Sarausad's defense[,] from opening argument to closing statement ... [and] objections to instructions." S.A. 42.

After Sarausad briefed his initial petition, the Washington Supreme Court, in *Roberts* and *Cronin*, effectively vindicated his trial counsel's objections. It rejected the State's "in for a dime" theory that the accomplice liability statute imposes liability "so long as the defendant knows that he or she is aiding in the commission of *any* crime." *Cronin*, 14 P.3d at 757;

Roberts, 14 P.3d 713. It also rejected the State's argument that the difference between Washington's Pattern Jury Instructions, which imposed "criminal liability" for "a crime," and the statute, which imposed liability for "the crime," was a distinction without a difference and did not alter the State's burden of proof. *Cronin*, 14 P.3d at 757; *Roberts*, 14 P.3d at 736

The majority instead held that the statute's distinction between "a" and "the" was significant and requires that the putative accomplice must have acted with "knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged." *Cronin*, 14 P.3d at 757; Pet. App. 201a. Four dissenters embraced the State's statutory reading as correct and consistent with long-standing practice. *Cronin*, 14 P.3d at 761.

In light of *Roberts* and *Cronin*, Sarausad amended his PRP to reassert his challenges to the trial judge's responses to the jury's questions, the instructions, and the prosecutor's arguments. S.A. 43-44. His PRP was denied. *Sarausad* v. *State*, 39 P.3d 308, 312 (Wash. Ct. App. 2001).

The PRP panel acknowledged that "the jury inquired three separate times during deliberations, indicating confusion with respect to the mens rea required for accomplice liability." Pet. App. 207a. The panel concluded, however, that "whatever the basis for the jury's confusion may have been, the accomplice liability instructions were sufficient, and nothing that the prosecutor argued to the jury required a remedial or supplemental instruction." Pet. App. 215a.

The PRP panel conceded that when the direct appeal court concluded "'that it was not necessary for

the State to prove Sarausad knew Ronquillo had a gun, or knew that there was potential for gunplay that day,'" it "erred." Pet. App. 205a. In the PRP panel's view, however, the prosecutor "did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a fist fight, he nevertheless was guilty of murder." Pet. App. 213a. The PRP panel believed "the prosecutor assigned a different meaning to the phrase 'in for a dime, in for a dollar'" to explain the "gang mentality" that could lead a gang member to agree to commit murder. *Id.*

Nowhere did the PRP panel consider whether, independent of the prosecutor's argument, directing the jury to re-read the same accomplice instructions over whose meaning they had disagreed, and over whose meaning the state appellate courts also had disagreed, would eliminate any reasonable likelihood that the jury would adopt the wrong standard.

The Washington Supreme Court denied discretionary review. Pet. App. 194a. Echoing the PRP panel, the commissioner stated the "prosecutor never suggested Mr. Sarausad could be found guilty if he had no knowledge that a shooting was to occur," and that "her proper point was that it was unnecessary for Mr. Sarausad to share Ronquillo's intent to kill." Pet. App. 192a. The commissioner likewise never addressed whether, apart from the prosecutor's argument, there was a reasonable likelihood that the jury misapplied the law.

9. Sarausad's Habeas Proceedings

Sarausad filed a habeas petition in the District Court for the Western District of Washington. The State's answer admitted that Sarausad had preserved

and exhausted the issue of jury confusion about accomplice liability.

The magistrate judge ruled that the state court's refusal to grant relief "was contrary to the clearly established law of *In re Winship*." Pet. App. 161a. Specifically, the magistrate found that the state courts had misconstrued the prosecutor's argument, overlooked the significance of the jury's questions, and erred in failing to give weight to the juror declarations. Pet. App. 162a-69a.

The magistrate also concluded that the record could not support a finding of every element beyond a reasonable doubt. Pet. App. 184a. In a detailed evaluation of the relevant transcripts that identified factual errors and omissions in the state opinions, the magistrate found "no evidence from which a reasonable juror could find, beyond a reasonable doubt, that [Sarausad] knew that anyone in his car was armed with a gun." Pet. App. 169a.

The district court noted that the Magistrate erred in considering the juror affidavits, but adopted the magistrate's recommendations. Pet. App. 128a-29a, 131a.

The Ninth Circuit affirmed. Pet. App. 79a. It held there was a reasonable likelihood that the jury was confused about accomplice liability and therefore that the State was relieved of its burden of proof on the "only seriously contested issue during Sarausad's trial." Pet App. 5a, 77a-78a.

The court found the instructions ambiguous because they: (1) did not plainly state that an accomplice must have knowledge of the actual crime the principal intends to commit; (2) were similar to those found to be inadequate by the Washington

Supreme Court; and (3) were misconstrued by the panel in Sarausad's direct appeal. Pet. App. 69a-71a.

The court then identified four reasons why this jury was in all reasonable likelihood confused. First, the evidence of intent was "thin" and "contradicted" or "minimized" by other evidence. Pet. App. 75a-77a. Second, the prosecutor "argued clearly and forcefully for the 'in for a dime, in for a dollar' theory of accomplice liability." Pet. App 76a. Third, the jury's questions "demonstrated substantial confusion about what the State was required to prove." *Id.* Finally, the PRP court "misstat[ed] the record and ignor[ed] the prosecutor's emphatic and repeated 'in for a dime, in for a dollar' argument." Pet. App. 77a.

Because the constitutional error related to "the only disputed issue," the panel concluded the error could not be harmless. Pet. App. 79a.

Judge Reinhardt concurred and dissented in part, concluding that "virtually no 'evidence,' direct or circumstantial," established Sarausad's purported knowledge. Pet. App. 89a. He observed, *inter alia*, that no evidence supported a finding that Sarausad knew of a gun or plan to shoot and that the manner of Sarausad's driving "was just as consistent with a planned fistfight." Pet. App. 93a.

Judge Bybee dissented. Pet. App. 99a. He found "[n]either the statute nor the instruction [to be] ambiguous," and saw no "reasonable likelihood" of jury confusion. Pet. App. 100a. He considered the "jury's questions ... certainly understandable given the facts, the complexity of the issue, and the length of the jury instructions," but believed that directing the jury to re-read the accomplice instructions adequately resolved that confusion. Pet. App. 122a-23a. He subsequently joined four judges in

dissenting from denial of rehearing en banc on a theory that the panel majority had disregarded Washington law by concluding the jury was reasonably likely to have misunderstood the accomplice instructions. Pet. App. 2a.

SUMMARY OF ARGUMENT

The Due Process Clause requires a State to prove beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Where there is a reasonable likelihood that a jury misunderstood the law in a manner that lowered the State's burden of proof on an essential element, the defendant is deprived of this clearly established constitutional right. *Estelle* v. *McGuire*, 502 U.S. 62, 73 n.4 (1991); *Francis* v. *Franklin*, 471 U.S. 307, 315-16 (1985); *Sandstrom* v. *Montaña*, 442 U.S. 510, 521 (1979); see also *Bollenbach* v. *United States*, 326 U.S. 607, 611-13 (1946); *Sparf* v. *United States;* 156 U.S. 51, 73-74 (1895); *United States* v. *Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.).

The jury's questions establish that this jury had "difficulty" reaching "agreement" on the level of *mens rea* for accomplice liability. Its final question on *mens rea* demonstrates that the jury contemplated applying a standard – incorrect under Washington law – in which a participant in a group activity is an accomplice to any crime any group member might subsequently commit. The trial court never told the jury that this standard was incorrect. Instead, the trial court directed the jury merely to "re-read" its instructions – instructions that the jury had repeatedly been told to read, and therefore that at least some jurors presumably viewed as supporting the erroneous standard in the question.

In these circumstances, it is reasonably likely that the jury misconstrued the instructions to provide for the lower standard of *mens rea* described in their question. That reasonable likelihood is underscored by the PRP court's acknowledgement that the state court itself "erred" in construing the instruction on direct review. Pet. App. 205a. Neither Petitioner nor the state courts has explained how there is not at least a reasonable likelihood that this jury misread and misapplied the accomplice instruction in the same manner as did the appellate panel on direct review. That likelihood is all the greater given that other appellate panels and state prosecutors in many cases misread the statute the same way. Again, Petitioner and the state courts have no response.

The state courts' analysis is objectively unreasonable because their inquiry was too narrow. The state courts asked only whether the prosecutor misled the jury and whether the accomplice instruction could be read consistently with Washington Supreme Court precedent on accomplice liability. The state courts should have asked whether the instructions alone were adequate to resolve the jury's confusion after the jury expressed difficulty reaching agreement on them and offered an erroneous standard of *mens rea* to illustrate its confusion. Had the state courts directly confronted that issue, they would have concluded that telling this jury to "re-read" instructions over which they disagreed was inadequate to prevent them from reaching the wrong construction, and thereby lowering the State's burden of proof on *mens rea*. Merely re-reading the statute had not prevented the state courts from misconstruing the same language. By not providing the jury any clarification akin to what the Washington Supreme Court later provided

the Washington courts, the trial court failed adequately to assist the jury in resolving its disagreement correctly. The trial court thus failed to eliminate a reasonable likelihood that the jury would misconstrue and misapply the law, just as the state court itself had done on direct review.

The state courts' failure to ask and properly answer the relevant question unreasonably departed from this Court's precedents. See *Sandstrom*, 442 U.S. at 521 (reversing even though instruction amenable to correct reading, and jury did not express confusion); *Francis*, 471 U.S. at 315-16 (same); see also *Boyde* v. *California*, 494 U.S. 370, 380 (1990) (recognizing that an instruction, "not concededly erroneous," can be "subject to an erroneous interpretation" that renders it unconstitutional); accord *Estelle*, 502 U.S. at 73 n.4. The state courts further erred in failing to assess the prosecutor's rebuttal in the context of Sarausad's closing argument, and in attempting to "somehow cordon off" a catch-phrase with an obvious legal connotation as conveying only a theory of gang motivation. See *Kelly* v. *South Carolina*, 534 U.S. 246, 255-56 (2002).

The state courts' failure to recognize the reasonable likelihood of jury confusion was objectively unreasonable in this case. Washington's pattern jury instructions may be adequate in other accomplice cases, but they proved inadequate to resolve the jury's expressed confusion here. This case exemplifies "the occasional abuse that the federal writ of habeas corpus stands ready to correct." *Jackson* v. *Virginia*, 443 U.S. 307, 322 (1979).

ARGUMENT

Sarausad is entitled to habeas relief "with respect to any claim that was adjudicated on the merits in

State court" that "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). A state court decision is "an 'unreasonable application of our' clearly established precedent if it 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Penry* v. *Johnson*, 532 U.S. 782, 792 (2001) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 407-08 (2000)). "Unreasonable" means "objectively unreasonable." *Williams*, 529 U.S. at 409. A state court decision is "objectively unreasonable" where it is founded, "in part, on a clear factual error," *Wiggins* v. *Smith*, 539 U.S. 510, 528 (2003), "fail[s] to evaluate the totality of the available [pertinent] evidence," *Williams*, 529 U.S. at 397-98; *Rompilla* v. *Beard*, 545 U.S. 374, 389 (2005), or rests upon an unduly narrow framing of the constitutional question, *Wiggins*, 539 U.S. at 527-28.

The habeas standard reflects deference to state courts, but "deference does not imply abandonment or abdication of judicial review." *Miller-El* v. *Cockrell*, 537 U.S. 322, 340 (2003). Furthermore, federal courts do not grant state decisions deference unless they "adjudicated ... the merits" of a federal claim. 28 U.S.C. § 2254(d). State court decisions that ignore or improperly frame federal claims or lack a clear resolution of such claims receive *de novo* review on questions of law and mixed questions of fact and law. See *Rompilla*, 545 U.S. 390.[2]

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[2] *Accord Bronshtein* v. *Horn*, 404 F.3d 700, 710 n.4, 715 (3d Cir. 2005) (Alito, J.) (reviewing habeas claims, including the adequacy of jury instructions, *de novo*); *Ellsworth* v. *Warden*, 333 F.3d 1, 4 (1st Cir. 2003) (en banc); *Hudson* v. *Hunt*, 235 F.3d

I. A CRIMINAL DEFENDANT HAS A CLEARLY ESTABLISHED RIGHT TO A FINDING ON EACH ELEMENT BY A JURY THAT IS NOT REASONABLY LIKELY TO MISCONSTRUE THE LAW.

1. This Court clearly established in *Winship* that the Due Process Clause of the Fourteenth Amendment guarantees a defendant the right not to be convicted unless the jury finds "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364. An omission or misdescription of an element of the charge, or an instruction that lowers or eliminates the government's burden of proof on an element, denies the defendant the constitutional right to insist upon a jury finding on each element beyond a reasonable doubt. See *Neder* v. *United States*, 527 U.S. 1, 10 (1999) ("misdescriptions and omissions ... preclude[] the jury from making a finding on the *actual* element of the offense"); *California* v. *Roy*, 519 U.S. 2, 5 (1996) (per curiam) (erroneous instruction is "as easily characterized" either as a "misdescription of an element" or an "error of omission") (internal quotations omitted); *Francis*, 471 U.S. at 318 (improper instruction on burden for proving intent).

A clearly established corollary of *Winship* is that a defendant is denied Due Process where there is a "reasonable likelihood" that the jury misunderstood the instructions in a manner that resulted in it not finding every fact necessary to constitute the crime beyond a reasonable doubt. *Estelle*, 502 U.S. at 72 (quoting *Boyde*, 494 U.S. at 380); *Francis*, 471 U.S. at

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892, 895 (4th Cir. 2000); *Miller* v. *Johnson*, 200 F.3d 274, 281 & n.4 (5th Cir. 2000).

318 (holding that instruction that altered burden of proof "with respect to the element of intent" was unconstitutional); *Carella* v. *California*, 491 U.S. 263, 265-67 (1989) (per curiam) (same with respect to instructions on other elements of the crime); *Sandstrom*, 442 U.S. at 521 (improper instruction on intent); cf. *Phillip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064-65 (2007) (holding states cannot permit a "significant" risk that a jury's misunderstanding deprived a civil defendant of Due Process). The "reasonable likelihood" standard is clearly established to be a likelihood of jury confusion greater than a bare "possibility," yet *less* than "more likely than not." *Boyde*, 494 U.S. at 380.

2. It is "self-evident" that the Due Process right, under *Winship* and its progeny, to a jury that understands the elements of the charged offense is "interrelated" with the Sixth Amendment right to a jury trial. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993); *Carella*, 491 U.S. at 268 (Scalia, J., joined by Brennan, Marshall, and Blackmun, J.J., concurring in judgment); see also *Sandstrom*, 442 U.S. at 523 (erroneous instruction impaired jury's constitutionally-assigned "factfinding function").

Justice Story described the right to a jury that understands and follows the law as "most sacred":

> Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.
>
> ... [This] is his privilege and truest shield against oppression and wrong ....

Battiste, 24 F. Cas. at 1043.

Echoing Justice Story, this Court has repeatedly recognized the constitutional importance of a jury grounded in the law. See *Sparf*, 156 U.S. at 73-74, 101-02 (quoting Justice Story in *Battiste* with approval and concluding that, with a contrary rule, "the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles"). Thus, a trial by jury, "in the primary and usual sense of the term at the common law and in the American constitutions," means a jury guided by a judge on the law. *Cap. Traction Co.* v. *Hof*, 174 U.S. 1, 13 (1899). Otherwise, the jury cannot fulfill its constitutional "responsibility for drawing appropriate conclusions." *Bollenbach*, 326 U.S. at 612.

For this reason, trial judges must explain the law to jurors "independently of any question from the jurors or any other indication of perplexity on their part." *Kelly*, 534 U.S. at 256; *Herron* v. *S. Pac. Co.*, 283 U.S. 91, 95 (1931) ("discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides"). When a jury raises a question, however, a judge has a "duty of special care" to respond with "concrete accuracy." *Bollenbach*, 326 U.S. at 612-13.

3. In *Sandstrom*, this Court established that a conviction may be unconstitutional where a jury instruction is not facially erroneous, but is subject to an erroneous interpretation. 442 U.S. at 517. In that case, the Montana Supreme Court had definitively construed a state law instruction on "deliberate homicide" in a manner consistent with federal constitutional requirements. *Id.* at 525. Although the jury did not ask the trial court to clarify the meaning of "deliberate homicide" or otherwise

express confusion on the issue, this Court nevertheless found, based on evidence outside the trial record, that "a reasonable jury could well have interpreted" the instruction incorrectly. *Id.* at 517.

This Court noted that "federal and state courts ha[d] warned" that the instruction could be misinterpreted. *Id.* at 517-18. The Court also noted that "the drafter of Montana's own Rules of Evidence" misunderstood the instruction in precisely the way the defendant feared the jury might have done. *Id.* at 518 & n.6. As a result, the Court unanimously reversed the judgment upholding the conviction because the jury "may have interpreted the judge's instruction" as "relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind." *Id.* at 521, 524.

This Court since has reaffirmed the central premise of *Sandstrom*—that a reasonable likelihood of jury confusion can exist even where an instruction is "not concededly erroneous," but is instead "subject to an erroneous interpretation." *Boyde*, 494 U.S. at 380; *Estelle*, 502 U.S. at 73 n.4. In such circumstances, this Court undertakes a "realistic assessment" of how a jury likely understood a set of instructions. See *Penry*, 532 U.S. at 804 (holding instructions may have misled jury about constitutional role in sentencing); *Bollenbach*, 326 U.S. at 612-14 (assessing likely impact on jury of erroneous supplemental instruction); *Bruton* v. *United States*, 391 U.S. 123, 135-37 (1968) (assessing jury's ability to follow instruction to disregard evidence); *United Bhd. of Carpenters & Joiners of Am.* v. *United States*, 330 U.S. 395, 410-11 (1947) (assessing likely impact of instructional error relating to corporate defendants on rights of individual defendants).

Where it is reasonably likely that a jury was confused about a principle of law important to carrying out its fact-finding role, this Court has found a constitutional violation. See *Penry*, 532 U.S. at 804; *Yates* v. *Evatt*, 500 U.S. 391, 401-02, 406 & n.6 (1991); *Francis*, 471 U.S. at 318; *Sandstrom*, 442 U.S. at 514.

4. Petitioner principally claims that federal habeas relief may not be granted here without "second-guess[ing] state court determinations of state law." Br. at 26. This claim is baseless.

Petitioner argues that no relief is available because this case involves, at most, an error on an issue of state law on accomplice liability. Quoting *Gilmore*, Petitioner claims that this Court has "never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief." Br. at 33 (quoting *Gilmore* v. *Taylor*, 508 U.S. 333, 342 (1993) (citing *Estelle*, 502 U.S. 62)).

Petitioner is wrong both about the availability of habeas relief and the relevance of *Gilmore*. Federal courts can and do grant habeas relief where a jury's confusion over state law deprives a defendant of "some constitutional right." *Estelle*, 502 U.S. at 72 (internal alterations omitted); accord *Middleton* v. *McNeil*, 541 U.S. 433, 436 (2004) (per curiam). *Gilmore* did not purport to disturb this principle of habeas jurisprudence. Moreover, the defendant in *Gilmore* did not argue that an instruction "somehow lessened the State's burden of proof" or "misstated applicable state law" on an element of the charge. 508 U.S. at 340. He complained of an inability to assert an affirmative defense under state law. *Id.* at 342-43. "*Winship's* due process guarantee does not

apply" to state-law affirmative defenses. *Id.* at 343. Thus, the defendant in *Gilmore* was, in effect, seeking relief based on an error of state law. *Id.* at 343-44. Here, in contrast, Sarausad seeks relief based on federal law: a "sacred right" under the Constitution to a jury that is not reasonably likely to have lowered the State's burden of proof by misunderstanding the *mens rea* needed to convict him as an accomplice.

Petitioner also relies on cases such as *Cupp* v. *Naughten*, 414 U.S. 141 (1973), *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), and *Patterson* v. *New York*, 432 U.S. 197 (1977) as establishing a "high burden" for finding that a jury instruction caused a constitutional error. See Br. at 30, 34-36, 37-40. None of these cases, however, involved a challenge to a court's failure to remedy a jury's expressed confusion and inability to agree on an instruction establishing the state's burden of proof with respect to *mens rea*, let alone an instruction that was misconstrued by the state court on direct appeal. See Part II, *infra*. Thus, while instructing a jury "in the language of the statute" (Br. at 39) may often be adequate, it is not and has never been deemed adequate by this Court to resolve a jury's admitted confusion in circumstances remotely comparable to those here.

Petitioner's reliance upon *Bradshaw* v. *Richey*, 546 U.S. 74, 76 (2005) (per curiam) is similarly misplaced. Br. at 26. In *Bradshaw*, the Ohio Supreme Court had provided "perfectly clear" and "authoritative" guidance on the construction of an Ohio statute. 546 U.S. at 76-78. This Court reversed because the federal court of appeals disagreed with the Ohio Supreme Court's construction. *Id.* at 76. Here, in contrast, the Washington Supreme Court's eventual clarification of its accomplice liability statute has been and remains controlling. Indeed, the

Washington Supreme Court's eventual clarification on accomplice liability forms the backdrop for why the reasonable likelihood of jury confusion in this case deprived Sarausad of his clearly established rights under *Winship*.

Petitioner also claims federal courts cannot "conduct[] an independent examination" of whether a jury could have misread a jury instruction. Br. at 26-28. This is incorrect. Although state courts possess "final authority" on the meaning of state statutes, state courts do not have "final authority" on whether a lay jury misunderstood an instruction. *Sandstrom*, 442 U.S. at 516; *Francis*, 471 U.S. at 315-16; see also 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 45:2 (7th ed. 2008) (decisions construing statutes not evidence that statutes are incapable of reasonable alternative constructions). The question is not what a State's highest court has "declare[d] the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning" under the circumstances. *Francis*, 471 U.S. at 315-16; *Sandstrom*, 442 U.S. at 516-17; accord *Boyde*, 494 U.S. at 380; *Mills* v. *Maryland*, 486 U.S. 367, 375-76 (1988); see also, *e.g.*, *Smith* v. *Texas*, 543 U.S. 37, 45 (2004) (per curiam) (rejecting state court's determination that jury was adequately instructed); *Penry*, 532 U.S. at 804 (granting habeas relief despite state court ruling that jury did not need guidance on instruction that quoted statute); *Carella*, 491 U.S. at 264-65 (rejecting state court's views about how jury understood statutory language); *Mullaney* v. *Wilbur*, 421 U.S. 684, 686 (1975); see also *id.* at 704 (Rehnquist, J., concurring).

Any other approach would insulate jury trials from constitutional challenge whenever juries were

instructed with copies of relevant criminal code provisions and told to "re-read" them to find the answers to questions. No matter how vague or ambiguous a state statute, state courts eventually will settle upon a definitive reading. Yet such resolution will not answer the separate question of whether a given jury reached the same reading. The state courts and dissenting judges below erred in failing to recognize this critical distinction.

Thus, as it has repeatedly done in the past, this Court here should determine whether an instruction, "not concededly erroneous," is nevertheless "subject to an erroneous interpretation" or otherwise could have contributed to "a reasonable likelihood" of confusion. *Boyde*, 494 U.S. at 380; *Estelle*, 502 U.S. at 73 n.4. Accepting the Washington Supreme Court's clarification of the accomplice liability statute, Sarausad is nevertheless entitled to habeas relief because it is reasonably likely that his jury did not understand accomplice liability as the Washington Supreme Court later dispositively construed it.

II. THE STATE COURTS' APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW WAS OBJECTIVELY UNREASONABLE

Under clearly established federal law as determined by this Court, Sarausad's conviction was unconstitutional and should be set aside. There is a reasonable likelihood that the jury misunderstood the *mens rea* required under Washington law for conviction as an accomplice to murder. The state courts' failure to vacate the conviction on this ground was objectively unreasonable.

A. There Is A Reasonable Likelihood That The Jury Misapplied The Accomplice Liability Instruction As Lowering The State's Burden Of Proof On *Mens Rea*.

This Court often must evaluate the reasonable likelihood of jury confusion solely by analyzing an ambiguity in a challenged instruction and extrinsic evidence of confusion in other cases. See, *e.g.*, *Sandstrom*, 442 U.S. at 514. Here, however, the Court also has direct evidence that the jury misunderstood its instructions. After seven days of deliberations, and after counsel and the court directed the jury to read the accomplice instructions multiple times,[3] the jury reported its "difficulty agreeing on the legal definition and concept of 'accomplice.'" J.A. 129. Specifically, it disagreed over whether a person who "willing[ly] participates in a group activity" is "an accomplice to any crime committed by anyone in the group[.]" *Id.*

In *Cronin*, the Washington Supreme Court rejected the State's argument that accomplice liability attaches "so long as the defendant knows that he or she is aiding in the commission of *any* crime." 14 P.3d at 757. Yet the only answer the jury received to this question was a direction to "re-read" four

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[3] The jury's first two questions on *mens rea* show it was confused about whether it had to find any level of *mens rea* for Sarausad. Over counsel's strong objection (J.A. 19, 25-26), Instructions 12 and 17 were phrased such that a jury could conclude that Sarausad, "the defendant," was guilty of first or second-degree murder, so long as either he "*or*" his "accomplice," Ronquillo, had the necessary *mens rea*. J.A. 9-10. By directing the jury to read Instruction 46 in answer to each of these first two questions, the trial court directed the jury to apply Instruction 46 to Sarausad. The jury's final question thus reflects its disagreement over the meaning of Instruction 46.

instructions and consider the fifty-three instructions as a whole. J.A. 129. Although the jury subsequently reached a verdict as to Sarausad, the issue is how the jury resolved its disagreement about accomplice liability. Did it erroneously conclude, as did the court of appeals on direct review, that knowledge of a "gang confrontation" was enough, and that "it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day"? Pet. App. 266a. Or did the jury conclude, as the PRP court did, that the State had to prove that Sarausad "knew generally that he was facilitating a homicide"? Pet. App. 204a.

Because the trial court merely directed the jury to re-read the instructions about whose meaning it disagreed, a reasonable likelihood exists that the jury accepted its own proposed incorrect interpretation. This is true because: (1) the state court on direct review adopted that incorrect reading; (2) other Washington courts and state prosecutors adopted that incorrect reading; (3) Instruction 46 (accomplice liability) on its face is potentially ambiguous; (4) Instructions 47 (intent) and 48 (knowledge) magnified the likelihood of the jury misconstruing Instruction 46; (5) re-reading Instruction 46 a third time after seven days of deliberations was unlikely to assist the jury; (6) the jury's verdict reflects confusion about accomplice liability; and (7) the prosecutor urged the jury to adopt an incorrect reading of Instruction 46.

1. First, it is at least reasonably likely that the jury adopted the same erroneous interpretation of Instruction 46 as the state appellate court on direct review. There, three appellate judges read and quoted Instruction 46 and the statute from which it is directly drawn. Pet. App. 256a-58a. They then

rejected Sarausad's argument "that the Washington Legislature did not intend to hold accomplices strictly liable for all crimes of the principal," and endorsed "the State's 'in for a dime, in for a dollar' theory" of liability. Pet. App. 261a, 265a-66a. The PRP court later conceded the court on direct appeal "erred" by failing to construe the accomplice liability statute to require, at a minimum, that Sarausad knew Ronquillo had a gun, or that there was potential for gunplay, thus lowering the State's burden of proof on the *mens rea* element. Pet. App. 205a.

If three judges after reading Instruction 46 in the context of this case made this error, then more than a bare possibility exists that a jury would make the same mistake. Neither the PRP court nor Petitioner has ever explained their confidence that the jury understood the law better than the panel of appellate judges on direct review. There is no good explanation.

The direct review panel presumably adopted an "objectively reasonable" construction of the accomplice statute. *Safeco Ins. Co. of Am.* v. *Burr*, 127 S. Ct. 2201, 2215-16 (2007) (statutory construction not "objectively unreasonable" where "sufficiently convincing ... to have persuaded [a] District Court to adopt it"). Jurors must be deemed to be at least "reasonably likely" to adopt an objectively reasonable statutory construction accepted on direct review. Any other result would unreasonably impugn the judgment of either the state court or the jury.

2. The PRP court's assumption that the jury understood Instruction 46 as the majority in *Roberts* and *Cronin* did flies in the face of the contrary reading on direct review, the longstanding disagreement among Washington courts at all levels over the meaning of the accomplice liability statute,

and the longstanding position of state prosecutors. Numerous Washington decisions, as well as the dissents in *Roberts* and *Cronin*, reflect the mistaken view that Washington's accomplice statute permits a defendant to be convicted as an accomplice to murder even absent knowledge of a plan or method to commit murder, so long as the defendant knew his conduct might assist in any crime. See *In re Smith*, 73 P.3d 386, 391 (Wash. Ct. App.) (unanimously concluding "we ourselves failed to recognize [the problem] until the *Cronin* and *Roberts* decisions"), *abrogated by In re Domingo*, 119 P.3d 816, 824 (Wash. 2003) (noting, over four dissents, that "even this court failed to understand the" contours of accomplice liability).

For example, in a case where the jury received the same accomplice liability instruction as Sarausad, the defendant argued that "knowledge ... of the crime" referred to "the" specific crime charged. *State* v. *du Mas*, 86 Wash. App. 1014, 1997 WL 258450, at *8-9 (1997). The appellate court disagreed, accepting instead the State's "'in for a dime, in for a dollar' theory of accomplice liability." *Id.* at *15. The court held "accountability for 'the crime' included accountability for "general knowledge that the principle intend[ed] to commit 'a crime.'" *Id.* at *8-9. The court thus affirmed a second degree murder conviction assuming the accomplice "did not know that [the principal] was premeditating murder [or] ... was actually committing murder." *Id.*; see also *State* v. *Robbins*, 87 Wash. App. 1112, 1997 WL 662015, at *2-3 (1997) (accomplice liability may be predicated on knowledge that one's actions "will promote or facilitate commission of criminality" or "general knowledge that [one] is assisting the principal in committing a crime").

Likewise, state prosecutors incorrectly advocated for years that accomplice liability attached for knowledge of *any* crime. That position is additional "strong evidence" of an objectively reasonable alternative reading of the accomplice liability statute. See *Gilmore*, 508 U.S. at 344-45 & n.3 (plurality); *United States* v. *Finnell*, 185 U.S. 236, 244 (1902).

Petitioner nonetheless contends (and the PRP court assumed) that the jury would not have misunderstood Instruction 46 because it does not substitute "a crime" for "the crime," which the Washington Supreme Court held erroneous in *Roberts*. The short answer to that argument is that it cannot be reconciled with the decision in this case on direct review. That court, like numerous other courts, had the statutory language before it, yet made precisely the error in construction that Petitioner insists the jury cannot be deemed reasonably likely to have made. The decision on direct review, the decisions of other Washington courts, and state prosecutors' previous positions render Petitioner's argument untenable.

3. A third reason this jury is at least reasonably likely to have misunderstood the *mens rea* for accomplice liability is that it lacked the benefit of the explanations of Instruction 46 subsequently provided by Petitioner and the Washington appellate courts, which go well beyond the plain language of the accomplice liability statute and Instruction 46.

This Court has recognized that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. Yet even lawyers and judges have needed help beyond the language of this statute to reach the correct

construction as clarified by the Washington Supreme Court.

Petitioner now clarifies for this Court that the State must prove knowledge of "*the* crime" and that "the" crime "*means the charged offense.*" Br. at 11 (second emphasis added); see *id.* at 49 ("Sarausad must have knowingly assisted Ronquillo in committing 'the crime' charged"). Petitioner also devotes nearly one page to further explicating the meaning of "the crime." Br. at 31. There, for example, Petitioner explains that knowledge of "the crime" means knowing "generally that [one's] conduct [is] promoting or facilitating a homicide." *Id.* Neither the prosecutor nor the trial court, however, told the jury that Sarausad was not an accomplice unless he had knowledge "generally" that he was facilitating a murder.

The Washington Supreme Court also needed more than the language of the statute to set the boundaries of accomplice liability. In rejecting "the State's argument that accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of *any* crime," that court clarified that "the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate '*the* crime' for which he or she is eventually charged." *Cronin*, 14 P.3d at 757. The PRP court summarized the standard of *mens rea* for accomplice liability in Washington in this way:

> From this, we conclude that the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of

> culpability required for any particular degree of murder.

Pet. App. 204a. The jury – though it pleaded for help in understanding its instructions – received not even an italicized "*the*," let alone clarification akin to what Petitioner and the state courts have now provided.

In such circumstances, this Court again should ask, as it did in *Bollenbach*: "What reason is there for assuming that the jury did not also fail to appreciate these factors which the Government, in an elaborate argument, explains as requisite for a proper understanding of that which at best was dubiously expressed?" 326 U.S. at 613. In *Bollenbach,* this Court refused to sustain a conviction on direct review where "three circuit judges" had concluded that a supplemental instruction was erroneous, and therefore the government's contrary assessment rendered the instruction at best "equivocal." *Id.* Instruction 46 also should be deemed equivocal, because here the definitive construction of Instruction 46 by the state courts includes an explanation well beyond what the jury was provided, and because the history of the statute shows that many jurists and the State misconstrued it. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Id.*

4. Fourth, the court directed the jury to consider two instructions along with the accomplice instruction, and the phrasing of those instructions increased the reasonable likelihood that the jury would misunderstand the *mens rea* for accomplice liability. Those instructions – Nos. 47 and 48 – focused on knowledge of or intent to commit "a crime" rather than "the crime" charged.

The first time the trial judge directed the jury to consider Instruction 48 was in response to the jury's final question on *mens rea*. It therefore is reasonable to suppose that the jury considered Instruction 48 particularly relevant to answering that final question. Instruction 48 defined "knowledge" as follows:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being *a crime*.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being *a crime*, the jury is permitted but not required to find that he or she acted with knowledge.

J.A. 18 (emphases added). It is reasonably likely that the jurors, reading Instructions 46 and 48 together, would have determined that "knowledge" for purposes of accomplice liability merely required knowledge of "a crime" – not necessarily of "the charged offense." Instruction 48 thus pointed the jury toward the interpretation of accomplice liability adopted by the court of appeals on direct review, not the interpretation accepted by the majority in *Cronin* and *Roberts*.

The trial court also again referred the jury to Instruction 47, which defined "intent" in terms of committing "a crime": "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes *a crime*." J.A. 17 (emphasis added). Under the *Roberts* approach of placing weight on the article "a," Instruction 47 suggests that Sarausad acted with the

intent necessary to be an accomplice to murder if he intended to facilitate "a crime," such as a fistfight. Thus, reading Instructions 47 and 48 together with Instructions 45 and 46 does not eliminate the reasonable likelihood that the jury failed to appreciate the linguistic significance of the "a crime" / "the crime" distinction; if anything, those instructions make it more likely still that the jury misapplied the law.

5. Fifth, this Court's decisions make clear that merely directing a jury to re-read the "plain meaning" of accomplice instructions already considered by it at length "does nothing to dispel [its] misunderstanding." See *Simmons* v. *South Carolina*, 512 U.S. 154, 170 (1994); *id.* at 178-79 (O'Connor, J., concurring). The jury's questions on *mens rea* should have left the trial court with "no doubt" that the jury lacked a "clear understanding" of accomplice liability. See *Shafer* v. *South Carolina*, 532 U.S. 36, 53 (2001).

This Court has observed that "[i]t almost goes without saying that if the jury ... understood the 'plain meaning'" of the instructions, "there would have been no reason for the jury to inquire about" them. *Simmons*, 512 U.S. at 170 n.10; *id.* at 178 (O'Connor, Rehnquist, and Kennedy, JJ., concurring in judgment) ("that the jury in this case felt compelled to ask" a question "shows that the jurors did not know" how to read the instruction). That is certainly true here, where the jury's final question on accomplice liability occurred only after it had been repeatedly directed, in answer to prior questions, to read the accomplice liability instructions. This "jury could not have intended to put a question [to the trial court] which had been already answered" by the instructions. *Armstrong* v. *Toler*, 24 U.S. 258, 279 (1826); see also *Shafer*, 532 U.S. at 53. Instructing

this jury merely to re-read the instructions over the meaning of which it disagreed was therefore unreasonable.

Petitioner, however, argues based on *Weeks* v. *Angelone*, 528 U.S. 225 (2000) that there is no "reasonable likelihood of unconstitutional application of the instructions" so long as a court *always* answers questions by pointing the jury back to the instructions and waiting for it to ask another question. Br. at 49-50. *Weeks* does not stand for this proposition, and Petitioner's reading cannot be reconciled with the above-cited decisions.

The jury in *Weeks* identified, in one question, two possible ways to perform its sentencing function. The court directed the jury to one paragraph in one instruction that unequivocally rejected the incorrect option and affirmed the correct one. *Weeks*, 528 U.S. at 228-29, 231-32. The jury here, in contrast, repeatedly asked about the *mens rea* for accomplice liability, stated that it was having difficulty understanding the definition, and offered an incorrect *mens rea* standard as an example of what it thought the instructions might permit. The trial court did not focus the jury on a discrete portion of one instruction that unequivocally answered its question and that might have been overlooked by the jury. Instead, the trial court told the jury to re-read four instructions on *mens rea* in the context of all the instructions.

The single paragraph highlighted by the trial court in *Weeks* also had been upheld by this Court as "constitutionally sufficient." *Id.* at 227, 231. The pedigree of Washington's accomplice liability instructions, by contrast, is one of confusion. Furthermore, *Weeks* discounted the alleged risk of jury confusion because the defendant's attorney "did not view the judge's answer to the jury's question as a

serious flaw in the trial at that time." *Id.* at 236. The attorney had made an oral motion to set aside the verdict, but failed to "even mention [the] incident in his motion." *Id.* at 237. In contrast, Sarausad's trial attorney (along with Reyes') objected at every available opportunity on the ground that the jury would misunderstand accomplice liability, including a standing objection to the instructions and responses to the jury's questions, and post-trial motions arguing that the jury did not understand the accomplice instructions. J.A. 19, 22-29, 132, 136, 138.[4]

In addition, the trial court in *Weeks* demonstrated that it was willing to assist the jury in what proved not to be a difficult sentencing decision. The jury asked two questions in six hours of deliberations. The trial judge responded to the first with a supplemental instruction and to the second by directing it to one paragraph in the instructions. Here, the jury had deliberated for *thirty hours* over *seven days*, and the court repeatedly declined to provide a supplemental instruction. By the final question, this jury surely had reached "a state of frayed nerves and fatigued attention, with the desire to go home." *Bollenbach*, 326 U.S. at 612. A reviewing court therefore cannot presume, as Petitioner suggests (Br. at 50), that if this jury remained confused, it would have asked yet another question.

Last, the jury in *Weeks* confirmed in open court that it acted in accordance with the law on the precise

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[4] Sarausad's objections also render *Henderson* v. *Kibbe*, 431 U.S. 145 (1977) inapposite. The defendant in *Henderson* failed to propose an instruction on an omitted element and failed to object at the trial and intermediate levels. *Id.* at 154-56. The jury also received other instructions such that the omitted instruction would not have affected its verdict. *Id.* at 156.

issue raised by its earlier question to the court. 528 U.S. at 234-35. The verdict in Sarausad's case offers no such assurances.

For all of these reasons, unlike in *Weeks*, the trial judge's responses did not eliminate the "reasonable likelihood," not merely the "slight *possibility*," that the jury remained confused about accomplice liability.

6. Sixth, the jury's verdict is consistent with an incorrect reading of the accomplice instructions as imposing liability for knowledge of *any* crime. Some jurors may reasonably have concluded that neither Reyes nor Sarausad knew of a gun or plan to shoot, and yet still voted to acquit only Reyes because Sarausad was driving, while Reyes was merely present in the car. J.A. 39. It is at least reasonably likely that some jurors found this distinction significant because, under the instructions, "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." J.A. 17. Even if some jurors thought neither Sarausad nor Reyes knew of a gun or plan to shoot, this instruction gave them a unique basis to acquit Reyes.

Petitioner ignores this ready explanation for the jury's verdict and instead infers from the mistrial on Reyes that the jury settled upon a correct construction of the accomplice liability statute. Br. at 51. Such an inference is neither possible nor appropriate on this record. See *Sandstrom*, 442 U.S. at 526 (finding constitutional error where reviewing court had "no way of telling" from "general" verdict whether jury interpreted instruction to lower the state's burden of proof). Because the jury did not return even a partial verdict as to Reyes, the mistrial on Reyes does not establish that the jury concluded

that Sarausad knew of a gun or a plan for a shooting, which the PRP admitted was essential to convict Sarausad as an accomplice to murder. Pet. App. 204a-05a. Moreover, any evidence that Sarausad knew of a gun was at best circumstantial, whereas direct evidence indicated Reyes knew of the gun. S.A. 13-15. Under the correct *mens rea* standard, the jury could not rationally acquit Reyes but convict Sarausad on weaker evidence of knowledge of a gun. The mistrial as to Reyes thus does not eliminate the reasonable likelihood that the jury adopted an incorrect theory of accomplice liability as to Sarausad.

7. Finally, the prosecutor repeatedly, specifically, and incorrectly described "the law" of accomplice liability. The hypotheticals she offered were "problematic" (Pet. App. 213a-14a) precisely because they suggested that Sarausad could be an accomplice to murder even if he knew nothing about a gun, a plan to shoot, or a plan to commit murder, but knew only that he was aiding gang activity that might lead at most to a fistfight. See *Cronin*, 14 P.3d at 757.

The prosecutor directed the jury to Instructions 45-46 on accomplice liability and offered her interpretation of those instructions. She described Instruction 46 as "all the ways somebody can assist or aid in the commission of a crime." J.A. 37. Reyes, for example, was an "accomplice" because he set "the wheels in motion, by simply calling his friends, getting them together, saying, 'Let's go avenge this problem.'" *Id.* Nowhere did she limit accomplice liability to Reyes' having general knowledge that "avenging" would include shooting.

Instead, she offered the jury "a good example of accomplice liability" that easily could be understood by a jury to impose accomplice liability even where

the accomplice lacks any knowledge that the principal would commit murder. J.A. 38. In her example, a person agrees to hold the arms of a victim about to be hit by a third person, but the principal beats the person to death. *Id.* According to the prosecutor, the person holding the arms is liable as "an accomplice and ... can't come back and say, 'Well, I only intended this much damage to happen.' Your presence, your readiness to assist caused the crime to occur and you are an accomplice. The law in the State of Washington says, if you're in for a dime, you're in for a dollar." *Id.*

Using "commonsense understanding," *Johnson* v. *Texas*, 509 U.S. 350, 368 (1993); *Penry*, 532 U.S. at 800, the jury would have thought the prosecutor was arguing about the law of accomplice liability because that is what she said she was doing. The prosecutor told the jury that, "[t]he *law* in the State of Washington says, if you're in for a dime, you're in for a dollar." J.A. 38 (emphasis added). Though she may at times also have directed arguments at "gang mentality," the overall "import of [her] argument simply cannot be compartmentalized" solely that way. *Kelly*, 534 U.S. at 255-56. Her arguments thus further establish a reasonable likelihood that the jury would have believed the instructions imposed criminal liability for knowledge of any crime.

B. The State Court's Application Of Clearly Established Law Was Objectively Unreasonable.

The analysis above demonstrates that the state court's decision was incorrect. The only remaining issue is whether that decision also was "objectively

unreasonable." *Wiggins*, 539 U.S. at 527-28.[5] It plainly was.

1. The PRP panel's decision was objectively unreasonable first because it framed the constitutional issue in an unduly narrow way and failed to address the most significant problem. It acknowledged the likelihood of "confusion with respect to the *mens rea* required for accomplice liability." Pet. App. 207a. But it then dismissed the problem as insubstantial because the instruction mirrored the statutory language and because the prosecutor's arguments were not (in the court's view) misleading. Pet. App. 207a, 215a. The court never considered whether, apart from these issues, asking the jury to re-read the accomplice instructions multiple times served to eliminate any reasonable likelihood that the jury remained confused about the law.

It was objectively unreasonable for the PRP court not to address whether the trial court fulfilled its duty to instruct the jury adequately on the law when, after the jury expressed disagreement over the meaning of its instructions and had been deliberating for more than a week, the judge told them once again

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[5] Petitioner nowhere challenges, either in the Question Presented, petition for certiorari, or opening brief, the Ninth Circuit's conclusion that the error cannot be deemed "harmless." Pet. App. 78a-79a. The Court therefore should affirm the Ninth Circuit's ruling on that point. Even where the issue is properly preserved and addressed, this Court typically defers to a lower court's assessments of harmless error. *Francis*, 471 U.S. at 326 n.10. In any event, misapplication of the *mens rea* standard could not reasonably be deemed harmless here. It affected Sarausad's central defense, and the facts do "not overwhelmingly preclude that defense." *Id.* at 325. The panel deemed the evidence of guilt "thin," and two federal judges and a magistrate judge deemed it insufficient to support the verdict.

to "re-read" the instructions. A judge's duty to instruct a jury adequately on the law is not a novel twenty-first century obligation. Courts have recognized since our nation's earliest days the judge's essential role in ensuring that the jury understands the law adequately to carry out its critical fact-finding function. *E.g.*, *Sparf*, 156 U.S. at 70-74 (collecting authorities). A judge's answer to a jury's first question does not have to be perfect and need not anticipate and answer all potential questions that might be lurking therein.[6] *Armstrong*, 24 U.S. at 278-79. But where, as here, it is clear that the jury does not understand an instruction, redirecting the jury to the source of its confusion is obviously inadequate, and the PRP court's failure to address that inadequacy was objectively unreasonable.

The predicate facts were not disputed by the PRP court. Specifically, the court acknowledged that:

- the jury had "inquired three separate times during deliberations, indicating confusion with respect to the *mens rea* required for accomplice liability" (Pet. App. 207a);

- the trial judge's only answers were "to re-read various instructions, including the accomplice liability instructions, together with the instructions as a whole" (Pet. App. 208a); and

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[6] Petitioner also complains that the Ninth Circuit should not have proposed a supplemental jury instruction on accomplice liability, which it views as flawed. Br. at 28-32. Federal courts can properly conclude that a supplemental instruction was "necessary" to preserve a criminal defendant's constitutional rights. *E.g.*, *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1668-69 & n.14 (2007). But, in any event, federal courts need not propose supplemental instructions to find written instructions alone were insufficient to resolve a jury's expressed confusion.

- the panel on direct appeal "erred" in construing the accomplice liability instructions in the context of this very case (Pet. App. 205a).

Given these acknowledged facts, the core constitutional defect in Sarausad's conviction – that there is a reasonable likelihood that the jury misconstrued the accomplice liability instruction the same way the direct appeal panel did – was apparent.

Yet the PRP court never confronted this problem. It never explained why it is not reasonably likely that the jury, left on its own to parse Instructions 45 and 46, over which it confessedly was in disagreement, together with Instructions 47, 48, and the rest of the instructions, would have concluded – just as the panel on direct review did – that Sarausad could lawfully be deemed an accomplice to murder even if he did not know he was assisting in a shooting. The PRP court's failure to assess the essence of the constitutional violation renders its decision objectively unreasonable. Compare Pet. App. 204a-15a with *Wiggins*, 539 U.S. 527-28 (holding that state court's decision was "objectively unreasonable" because court "did not conduct an assessment" of whether counsel's investigation was adequate, but assumed that it was).

The PRP court chose instead to focus its analysis on the prosecutor's statements in closing argument. Pet. App. 208a-15a. Once the PRP court concluded that the prosecutor did not argue "in for a dime, in for a dollar" as a theory of law, it concluded that the jury could not have misconstrued the accomplice liability instructions. Pet. App. 212a-15a.

This framing of the issue is unduly narrow. The jury told the trial court that it was considering a theory of liability under which a willing participant

in group activity becomes an accomplice to any crime that any participant later commits. J.A. 129. Even if the PRP court were correct that *the prosecutor* did not plant this theory in the jury's mind, *something* did. Because the direct review court erred in answering the same question, it was objectively unreasonable for the PRP court not to address the likelihood that this jury would have erred in the same way.

Thus, even after the PRP's analysis of the prosecutor's closing, two questions remain: (1) how did the jury resolve the internal disagreement set forth in its final question, and (2) did it choose the direct appeal panel's incorrect reading? The PRP court's interpretation of the prosecutor's closing argument does not answer these questions. The decision of the panel on direct appeal demonstrates that the jury reasonably could have adopted an incorrect understanding of Washington law. The PRP court's incorrect application of federal constitutional law is objectively unreasonable because it fails to grapple with the central constitutional defect in the trial proceedings.

2. The PRP court's decision is objectively unreasonable for a second, independent reason: its assessment of the prosecutor's argument is manifestly incorrect. As shown in Part II.B.1, *supra*, even if a reviewing court were to accept the prosecutor's argument as legally sound, that is insufficient to remove the reasonable possibility that the jury misinterpreted the instruction. The PRP court's evaluation of the prosecutor's argument cannot withstand even the deferential scrutiny appropriate on habeas review.

First, the PRP's analysis is objectively unreasonable because it conflicts with the State's usage of "in for a dime, in for a dollar" as an

explication of the legal scope of accomplice liability in other cases. *State* v. *Evans*, 114 P.3d 627, 635 (Wash. 2005) (holding that the same prosecutor as in Sarausad's case improperly argued "in for a dime, in for a dollar" theory of accomplice liability). Such usage confirms that the catch-phrase, even if apt as an explanation of gang behavior, also conveys a legal theory of accomplice liability. The PRP court plainly erred in attempting to "compartmentalize[]" one meaning from another. *Kelly*, 534 U.S. at 255-56.

Second, the PRP court's analysis is objectively unreasonable because it misconstrues the usage that the prosecutor made of the catch-phrase in this case. For example, the prosecutor framed her closing argument as principally about the law, not the facts. She told the jury that "what I'm going to do is talk to you about some of the legal principles, some of the instructions that the Court has given you on the law that applies in this case." J.A. 32; see also J.A. 34, 37. She then used her discussion of Instructions 45 and 46, her hypotheticals, and her flat disagreement with Sarausad's counsel on the law of accomplice liability to link "in for a dime, if for a dollar" to the *mens rea* needed for accomplice liability. J.A. 37-38.

The PRP court's contrary conclusion rests chiefly on its observation that the prosecutor never told the jury in so many words "that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight." Pet. App. 214a-15a. But by overlooking the closing argument of Sarausad's counsel, the PRP

failed to see that the prosecutor effectively conveyed exactly that point in rebuttal.[7]

Sarausad's counsel had argued – in language that closely tracks the standard Petitioner now concedes is correct – that Sarausad was not an accomplice to murder unless he had "knowledge that his assistance in driving the car would promote or facilitate the charged crime or a lesser crime being charged." J.A. 83-84; compare *id.*, with Br. at 11. Sarausad's counsel also told the jury – in words the PRP court would later vindicate – that if Sarausad "didn't know of a gun or plans for use of a gun for any purpose, he was not an accomplice under the instructions even as to manslaughter. Because he didn't have knowledge his own actions would promote or facilitate the crime." J.A. 110; compare *id.*, with Pet. App. 205a.

This context is critical, because in rebuttal, the prosecutor did not concede the accuracy of *any* aspect of Sarausad's legal position. Instead, the prosecutor disputed it as inconsistent with the "old adage, you're in for a dime, you're in for a dollar." J.A. 123. She argued that "there is nothing, nothing whatsoever in the accomplice liability instructions that you have that says they have to sit down and plan a talk about it. It is sufficient ladies and gentlemen, if you are present, if you are ready to assist." J.A. 118. Otherwise, she argued, "they're not ever an accomplice to anything." J.A. 123. She reminded the jury again of her example of being guilty of murder merely by agreeing to help assault. *Id.* Using that

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[7] The PRP court noted (Pet. App. 215a n.11) that defense counsel also argued that Sarausad was not an accomplice to murder unless he shared the same intent as Ronquillo. The PRP court overlooked that the jury was never given any instruction to distinguish between that level of knowledge and knowledge generally that actions would promote a homicide.

example as a legal yardstick, she concluded again that "If you're in for a dime, you're in for a dollar." *Id.*

The rebuttal argument – when read in the context the jury heard it, as disputing Sarausad's presentation of the law – confirms that it is reasonably likely that the jury understood that the prosecutor wanted them to equate the scope of accomplice liability with "in for a dime, in for a dollar." The PRP court's failure to address the prosecutor's argument in the context of Sarausad's counsel's closing was objectively unreasonable.

The PRP panel also did not consider the fact that the panel on direct review understood the prosecutor's argument as a legal argument or that petitioner never claimed otherwise to that court. Given the context of the rebuttal argument and the direct appeal court's understanding of the catch-phrase as a "maxim" of law, "[t]here is surely a reasonable likelihood that the jurors accepted" her arguments as a guide to the applicable law. See *Brewer* v. *Quarterman*, 127 S. Ct. 1706, 1712 (2007). "When viewed in [the] light" of this record, the gloss given to the prosecutor's argument by the PRP court thus "resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of" the prosecutor's words and intent. *Wiggins*, 539 U.S. at 526-27. The prosecutor's use of "in for a dime, in for a dollar" to describe "gang mentality" does not eliminate the reasonable likelihood of confusion as to the legal standard; if anything, the pervasive use of the catch-phrase increased the likelihood that the jury was misled. [8]

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[8] Petitioner cites *Brown* v. *Payton*, 544 U.S. 133 (2005), where the Court denied relief under AEDPA based on an improper

3. The objective unreasonableness of the PRP court's decision also is apparent when this case is compared to prior decisions by this Court. In *Sandstrom*, as here, the state supreme court had definitively construed the statute, rendering its meaning clear as a matter of state law. 442 U.S. at 520-21 & n.10. Nevertheless, this Court found a reasonable likelihood that the jury could have misread that instruction because the decisions of other courts and the mistaken reading of the drafters of the Montana Rules of Evidence indicated the potential for misreading of the instruction. *Id.* at 517.

Here, the potential for the jury to have misunderstood the instruction is far more apparent. The court on direct appeal in this very case, and the drafters of the state's model jury instructions, misunderstood the accomplice statute. Sophisticated lawyers attempting to guide lay jurors failed to grasp its meaning. And beyond the record of scholarly and judicial confusion, which alone sufficed in *Sandstrom*, the jury here confirmed its confusion on three occasions, including by proposing an incorrect, alternative reading of the accomplice instruction.

The circumstances here also present a stronger case for jury misapplication than in *Mills*. There, as here, a majority of the state supreme court had adopted a "plausible" reading of an instruction and

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closing argument. There, the jurors were "not likely" to have been misled because, unlike here, the prosecutor "was not given an opportunity to rebut defense counsel's argument," the meaning of the instruction was plain, the jury asked no questions, and the prosecutor's argument was self-evidently meritless because, to credit it, the jury "would have had to believe that the penalty phase served virtually no purpose at all." *Id.* at 143-46.

verdict form, 486 U.S. at 377-78, but unlike here, the jury completed the verdict form without expressing any confusion. *Id.* at 370, 381 (noting lack of "extrinsic evidence of what the jury ... thought"). This Court nonetheless reversed because of a "substantial" risk that the jury misunderstood the law. *Id.* at 381. A dissenting justice on Maryland's highest court had expressed surprise at "the majority's reading of the statute and verdict form," which he described as contrary to "nearly ten years of extensive litigation involving [the] statute." *Id.* at 381 (quoting *Mills* v. *State*, 527 A.2d 3, 33 (Md. 1987)). The correct reading "may not have been evident at all to the jury." *Id.* at 369. This Court thus "conclude[d] that there [was] a substantial probability" the jury picked the wrong reading. *Id.* at 384.

Here, not just one but four judges of the state supreme court, as well as the direct review panel, numerous other appellate panels, and the Supreme Court Committee on Model Jury Instructions all misread the statute. Here, moreover, the jury itself, after having been instructed twice to read the instruction defining *mens rea* for accomplice liability, told the judge it did not agree on the definition of accomplice and was considering applying an incorrect standard. Given this Court's prior holdings, the state court's failure to identify and evaluate these indicators of jury confusion was objectively unreasonable.

4. Finally, the PRP court's decision is objectively unreasonable because it is fundamentally inequitable. Petitioner maintains that it is not reasonably likely that the jury adopted a theory of accomplice liability that the State itself successfully endorsed for years. The State's position as described by the

Washington Supreme Court in *Cronin* and *Roberts* was that knowledge of *any* crime sufficed because accomplice liability could be reduced to "in for a dime, in for a dollar." It was objectively unreasonable for the PRP court to fail to recognize that a jury could reasonably have reached the same erroneous construction advocated by the State. See *Bradshaw* v. *Stumpf*, 545 U.S. 175, 189 (2005) ("serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings") (Souter, J., concurring).

* * * *

It is readily apparent from the trial record, as described by the PRP court, that it was at least reasonably likely, perhaps even more likely than not, that the jury applied an incorrect, and lower, standard of *mens rea*. Such a standard relieved the State of its burden of proving that Sarausad acted with knowledge that he was promoting or facilitating murder. It was objectively unreasonable for the state courts to conclude otherwise given: (a) the jury's repeated questions on *mens rea* and statement that it was considering applying an erroneous standard; (b) the history of judicial error in construing the statutory language, including on direct appeal; (c) the trial court's refusal to answer the jury's questions other than with a direction to re-read instructions, including instructions that lacked the clarification Petitioner and the state courts have since provided; (d) the prosecutor's misleading arguments to the jury; and (e) the longstanding, well-established duty of trial courts to ensure that juries understand the governing law adequately to carry out their fact-finding duty. *Francis*, 471 U.S. at 315-16; *Sandstrom*, 442 U.S. at 516-17; *Mills*, 486 U.S. at 384; see also, *e.g.*, *Smith*, 543 U.S. at 45; *Penry*, 532

U.S. at 804; *Carella*, 491 U.S. at 264-65; *Mullaney*, 421 U.S. at 686.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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August 20, 2008

SUPPLEMENTAL APPENDIX

Department No. 35
Date: Sep 19, 1994
Page 1 of 2

JUDGE: Judge Larry Jordan
BAILIFF: Gail Butryn
COURT CLERK: Joyce Zamelis
REPORTER: Patricia Stresky

King County Cause No. 94–1–02226–8 Reyes
94–1–02227–6 Sarausad
94–1–02988–2 Ronquillo

State of Washington,
Plaintiff,

v.

Jerome Mark Reyes, and Cesar Fransco Sarausad II, and Brian Keith Ronquillo, and each of them,
Defendants.

Litigants and attorneys

State of Washington represented by OPA: Sue Noonan & Lisa Marchese

Jerome Reyes present and represented by counsel: John Austin

Cesar Sarausad present and represented by counsel: Michael Nance

Brian Ronquillo present and represented by counsel: Tony Savage

* * * *

Minute Entry

Oct. 21, 1994

Court cites legal authority supporting its decision and affirms its decision and ruling denying Deft. Ronquillo motion for mistrial or severance.

Jury present.

Counsel for Deft. Sarausad makes final argument.

Jury absent.

Deft. Ronquillo moves for mistrial or severance due to remarks of counsel for Def. Sarausad in final argument.

Court denies both motions.

Jury present.

Counsel for Def. Ronquillo makes final argument. Counsel for State makes rebuttal argument. Court excuses the alternative jurors. Clerk invites all counsel to inspect and check all admitted exhibits prior to submission to the Jury.

At 2:25 p.m., the Jury commences deliberations.

At 4:20 p.m., the Bailiff by order of the Court, releases the Jurors from deliberations to return at 9:00 a.m., 10-24-94 to resume deliberations.

* * * *

Oct. 24, 1994

Defendants and respective counsel not present.

The jury returns to the jury room to resume deliberations at 9:00 a.m.

At 10:58 a.m., the jury sends out a written request:

"Request cassette tape player to listen to 911 call exhibit #22"/s/ Drew Anderson, Foreman

The Court confers with respective counsel – counsel for State (Noonan), counsel for Sarausad and counsel for Reyes in person, and counsel for Ronquillo via speaker phone. The Court proposes allowing the jury to have a tape player for a limited amount of time, with instructions to play the tape only once.
Counsel for the State and for Defts. Ronquillo and Sarausad agree to the Court's proposal. Counsel for Deft. Reyes objects to any replay of the 911 tape.

The Court replies in writing to the jury at 11:45 a.m.:

> "You will be provided with a tape player for 10 minutes. You are only permitted to listen to the tape or any part thereof once."

The Bailiff delivers the Court's reply to the jury, whereupon they indicate that they will buzz when they are ready for the tape player.

The jury interrupts deliberation for a lunch break from 12:30-1:30 p.m.

The jury buzzes and requests the tape machine to play Exhibit #22, which is given to them at 3:02 p.m. They buzz again at 3:10 p.m., indicating that they are finished, and the tape machine is removed from the jury room.

At 3:50 p.m., the jury is excused for the day by the Bailiff, by order of the Court, to return tomorrow at 9:00 a.m. to resume deliberation.

* * * *

Oct. 25, 1994

Defendants and respective counsel not present.

The jury returns to the jury room to resume deliberations at 9:00 a.m.

At 11:30 a.m., the jury sends out a written inquiry:

> Request clarification on instructions No. 11 & No. 12 element (3); does the "intent" apply to (the defendant only) or to (the defendant or his accomplice)? /s/ Drew Anderson, Foreman

The Court confers with respective counsel. Counsel for State and for Defendants Reyes and Sarausad appear in person. Counsel for Deft. Ronquillo indicates per telephone call that he will adopt the position of other defense counsel.

Counsel for Deft. Reyes suggests a reply referring the jury to instructions 6, 46 and 47 as well as the instructions as a whole.

At 12:00 p.m., the Court replies to the jury in writing:

> "Refer to instructions 46 and 47 and consider your instructions as a whole."

Counsel for Deft. Reyes objects and excepts to the Court not including reference to instruction #6. Counsel for Defts. Sarausad and Ronquillo join in the objection.

The jury interrupts deliberations from 12:30 to 1:30 p.m. for lunch.

Counsel for Deft. Sarausad file a document in court at 1:20 p.m. requesting that a minute entry be made of the time of delivery, Document title: Defendants Sarausad's Continuing Objection to Court's "To Convict" Instructions.

At 4:00 p.m. the Bailiff, under order of the Court, excuses the jury for the day to return tomorrow at 9:00 a.m. to resume deliberations.

* * * *

Oct. 26, 1994 Defendants and respective counsel not present.

The jury returns to the jury room to resume deliberations at 9:00 a.m.

The jury takes a lunch break from 12:30-1:40 p.m.

At 3:57 p.m. the Bailiff, under the direction of the Court, excuses the jury for the day, to return tomorrow at 9:00 a.m. to resume deliberations.

* * * *

Oct. 27, 1994 Defendants and respective counsel not present.

The jury returns to the jury room to resume deliberations. All jurors are present by 8:52 a.m.

At 11:44 a.m. the jury sends out a written inquiry:

> "Request to rehear the testimony of Cesar Frasco Sarausad, II."
> /s/ Drew Anderson, Foreman

The jury breaks for lunch from 11:45 a.m. to 1:10 p.m.

The Court confers with respective counsel by telephone.

At 1:30 p.m., the Court replies in writing:

"Testimony will not be repeated." The Court orders that the Confidential Juror Questionnaire for each of the 100 prospective jurors in these cases be sealed.

At 3:50 p.m. the Bailiff, under the direction of the Court, excuses the jury for the day, to return and resume deliberations tomorrow at 9:00 a.m.

* * * *

Oct. 28, 1994 Defendants and respective counsel not present.

The jury returns to the jury room to resume deliberations at 8:55 a.m.

At 11:25 a.m. the jury sends out a written inquiry:

> Reference: Instruction No. 17 in "the crime of murder in the second degree (intentional)" Question: Does intentional apply to only the Defendant or only his accomplice? /s/ Drew Anderson, Foreman

The Court confers with respective counsel–counsel for State (Noonan) for Deft. Reyes in person and for Defts. Sarausad and Ronquillo by telephone. Counsel for State and for Defts. Ronquillo and Reyes indicate no objection to the Court giving the same reply it gave to the jury's previous inquiry on Oct. 25, 1994. Counsel for Deft.

Sarausad maintains the same objection it previously made orally and per his brief filed on that date.

At 11:55 a.m. the Court replies in writing:

> "Refer to instructions 45 and 46 and consider the instructions as a whole."

The jury breaks for lunch from 12:30-1:30 p.m.

At 3:55 p.m. the Bailiff, under the direction of the Court, excuses the jury for the weekend, to return Monday, Oct. 31, 1994 at 9:00 a.m., to resume deliberations.

* * * *

Oct. 31, 1994 Defendants and respective counsel not present.

The jury returns to the jury room to resume deliberations at 9:00 a.m.

The jury breaks for lunch from 12:30-1:30 p.m.

At 2:42 p.m., the jury sends out a written inquiry:

We are having difficulty agreeing on the legal definition and concept of "accomplice."

Question:

> When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?"
> /s/ Drew Anderson, Foreman

The Court confers with respective counsel in person (State) and by telephone (Defts.) and indicates its proposed reply.

Counsel for Deft. Ronquillo suggests "refer to your instructions," but has no objection to the Court's proposed reply.

Counsel for Deft. Reyes suggests "see instruction 46 and consider your instruction as a whole, but has no objection to the Court's proposed reply.

Counsel for Deft. Sarausad suggests either:

> (1) No, or
> (2) Re-read instruction #46 (accomplice definition) with the added clarification:
>
> (1) Must promote or facilitate the crime being considered by the action;
>
> (2) The actor must have the mental state required for the crime; and
>
> (3) The accomplice must know that the actor had the required mental state.

Counsel for Deft. Sarausad objects to the Court's proposed reply.

At 3:06 p.m, the Court replies in writing:

> "Reread instructions #45, 46, 47 and 48, and consider your instructions as a whole."

At 3:50 p.m. the Bailiff excuses the jury for the day, to return tomorrow to resume deliberations at 9:00 a.m.

* * * *

Nov. 1, 1994 Not Reported

Defendants and respective counsel not present

The jury returns to the jury room to resume deliberation at 8:55 a.m.

At 10:40 a.m. the jury sends out a written inquiry: "We have reached a verdict for Brian Keith Ronquillo and Cesar Franco Sarausad II We are unable to read a verdict for Jerome Mark Reyes. How do we proceed? /s/ Drew Anderson

The Court confers with respective counsel.

Defendants and respective counsel present.

Patricia L. Stresky, Reporter

The jury returns to open court at 12:08 p.m.

The Court inquires of the foreman whether there is a reasonable probability of the jury, within a reasonable amount of time, reaching a verdict as to defendant, Reyes.

The foreman answers "no." Upon inquiry, all 12 jurors answer "no."

The court reviews the verdict forms received from the foreman. The Court excuses the jury, returning them to the jury room.

Jury absent

The Court informs Defendants and respective counsel that the jury has not answered the Special Verdict forms and that he will further instruct them as to these forms.

Jury present

The Court instructs the jury to return to the jury room to deliberate further re Special Verdicts.

Jury absent

Defendant Reyes' motion for mistrial– Ruling resolved.

Jury Present

The jury returns with the verdicts, which are read by the clerk

Defendant Ronquillo:

Count I - Murder 1° - Guilty
Count II - not used
Count III - Attempted murder 1° - Guilty
Count IV - Attempted murder 1° - Guilty
Count V - Assault 2° - Guilty

Special Verdict – Deadly weapon in Count V - Yes

Defendant Sarausad:

Count I - Murder 1° - Not Guilty; lesser murder 2° - Guilty
Count II - Not used
Count III - Attempted murder 1° - Not Guilty
lesser included attempted murder 2° - Guilty
Count IV - Attempted Murder 1° - Not Guilty
lesser included attempted murder 2° - Guilty
Count V - Assault 2° - Guilty
Special Verdict – Deadly Weapon in Count V – Yes

The Court directs that the jury be polled as to each GUILTY verdict.

All 12 jurors answer as to each inquiry that this their individual verdict and the verdict of the jury.
The verdicts are filed, including all blank forms, per order of the Court.

The Court excuses the jury from further deliberation in these causes.

Sentencing date to be set.

Judge Jordan

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS VOLUME XI OCTOBER 10, 1994

* * * *

[1900] LEV ARAKELYAN, called as a witness on behalf of the State, being duly sworn through the interpreter, testifed as follows:

DIRECT EXAMINATION

BY MS. MARCHESE:

Q. Good afternoon, Mr. Arakelyan. Will you start by telling the jury your name and spelling your last name for the Court Reporter.
A. Lev Arakelyan

* * * *

[1915-17] Q. Now, while you were at Guarav's, did you see the defendant, Mr. Ronquillo, with the defendant, Mr. Reyes?
A. Yes.
Q. What were they doing?
A. They were standing with their backs to me.
Q. Was this in the garage?
A. Yes.
Q. Did they appear to be talking to one another?
A. Yes, I think so.
Q. Were they talking to anybody else?
A. I didn't hear it because the music was playing.

Q. When they were talking, was this before or after the group decided to go back to Ballard.

A. I don't remember.

Q. While they were talking, Lev, did you hear anything?

A. I thought that I heard the sound of charging of a gun. But the music was playing.

Q. The sound of charging of gun, could you describe the sound you heard?

A. What do you mean by description?

Q. Well, let me ask you the question this way: Have you ever been to a firing range before?

A. Yes.

Q. Who have you been there with?

A. With my father.

Q. Have you heard the sound of a gun being charged before?

A. Yes.

Q. Is that what it sounded like to you?

A. I think so.

* * * *

Judge Jordan

IN SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 94-C-02227-6
Oct. 25, 1994

STATE OF WASHINGTON,
Plaintiff,

v.

CESAR SARAUSAD II,
Defendant.

DEFENDANT SARAUSAD'S CONTINUING OBJECTION TO COURT'S "TO CONVICT" INSTRUCTIONS

Defendant Sarausad, by and through undersigned counsel, maintains his objection to the court's giving of "to convict" instructions as they relate to defendant Sarausad (instructions no. 12, 17, 23, 27, 31, 38, 41, and 44), in that each of them permit the jury to convict him on the basis of his or "his accomplice"'s actions and intentions. By equating "principles" and "accomplices", the instructions improperly permit the jury to infer that the undisputed shooter, Brian Ronquillo, could have been Mr. Sarausad's accomplice, rather than his purported principle. As an accomplice, Mr. Ronquillo could be found to have, with knowledge that it would promote or facilitate the commission of the charged crimes, agreed with a person other than Mr. Sarausad to aid or assist in the commission of the charged crimes. But the

instructions as written would nevertheless allow a conviction of Mr. Sarausad.

The matter is raised anew by the recent jury question (posed at 11:45 a.m. on October 25, 1994) regarding whether the defendant or an accomplice have to share the requisite premeditated intent in prong 3 of instructions 11 and 12. The defense assumed in not voicing further objections that the court would not have re-instructed the jury in the manner earlier suggested during the taking of formal objections to instructions.[1] In the event this is not the case, the defense renews its original objections and requests that the court reinstruct the jury in the manner earlier requested.

Respectfully submitted this 25th day of October, 1994—1:15 pm.

Michael Nance
Attorney for Defendant Sarausad

[1] The defense earlier objected to the court's instructions and requested that instead each of the "to convict" instructions require proof that "the defendant or another person to whom he was an accomplice" fired the shots in question and acted with the requisite state of mind. The court overruled the objection.

Judge Jordan

IN SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 94-C-02227-6
November 14, 1994

STATE OF WASHINGTON,
Plaintiff,

v.

CESAR SARAUSAD II,
Defendant.

DEFENDANT SARAUSAD'S MOTION FOR NEW TRIAL AND SUPPORTING MEMORANDUM OF LAW

Defendant Cesar Sarausad II, by and through undersigned counsel and pursuant to CrR 7.6, moves the court for an order granting him a new trial. This motion is based upon the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 3 of the Washington State Constitution, the files and records herein, the declaration of defense counsel filed contemporaneously herewith, and the annexed memorandum of law. The defense also moves, pursuant to CrR 7.6(c), for additional time as may be necessary to adequately supplement the record herein.

Dated this 14th day of November, 1994

Michael Nance, WSBA # 13933
Attorney for defendant Sarausad

Statement of case

Defendant Cesar Sarausad was convicted at a jury trial of one count of murder in the second degree, two counts of attempted murder in the second degree, and one count of assault in the second degree while armed with a deadly weapon. Co-defendant Brian Ronquillo was convicted by the same jury of first degree murder, two counts of attempted first degree murder, and one count of assault in the second degree. Mr. Sarausad's apparent culpability derived from his status as an accomplice to Ronquillo, who fired a semi-automatic pistol from the window of Mr. Sarausad's moving vehicle, causing death or near death to the victims.

Following several weeks of testimony, the jury received the case and began deliberating during the afternoon of Friday, October 21, 1994. Deliberations continued during all of the following week and into the week thereafter, finally concluding with a verdict around midday on Tuesday, November 1, 1994. During deliberations the jury posed several written questions to the court, most related to the concept of accomplice liability as it might apply to particular defendants.

On October 25, 1994 the jury requested clarification on element #3 of instructions 11 and 12, asking whether the "intent" requirement applied to the defendant only or to his accomplice. The court referred the jury to instructions 46 and 47 (accomplice and intent definitions). Defendant Sarausad filed a continuing objection to the "to convict" instructions insofar as they permitted the jury to find co-defendant Ronquillo an "accomplice" rather than a "principle" of Sarausad.

On October 27, 1994 the jury requested to re-hear the testimony of defendant Sarausad and were instructed that this was unavailable. On October 28, 1994 the jury asked about instruction no. 17 (the "to convict" instruction as to the lesser included offense of intentional murder in the second degree (count I) as to defendant Sarausad). The jury asked if "intentional" applied only to the defendant (Sarausad) or his accomplice. The court replied that the jury should refer to instructions 45 and 46 (accomplice accountability and accomplice definition) and consider the instructions as a whole.

The final jury inquiry was posed at 2:42 p.m. on Monday, October 31, 1994, when the jury indicated it was still having difficulty agreeing on the legal definition and concept of "accomplice". It asked whether a person who willingly participates in a group activity is an accomplice to any crime committed by anyone in the group. Mr. Sarausad, through counsel, suggested that the court answer the question in the negative. It then posed an alternative: that the jury be instructed to reread instruction 46 (the accomplice definition with the added clarification: to be an accomplice, 1) one must promote or facilitate the crime being considered by the actor, 2) the actor must have the mental state required for the particular crime, and 3) the accomplice must know that the actor had the required mental state. At 3:06 p.m. court instructed the jury to simply reread instructions 45, 46, 47, and 48 (accomplice accountability, accomplice definition, intent definition, and knowledge definition) and consider the instructions as a whole. The jury was excused for the day at 3:50 p.m. The following morning, at 10:40 a.m. the jury indicated that it had reached verdicts as

to co-defendants Ronquillo and Sarausad but was unable to reach a verdict as co-defendant Reyes.

The verdict was read in open court shortly after midday on November 1, 1994. A short while later the jury met and discussed their deliberative process with trial counsel. See declaration of defense counsel.

Argument

The court's refusal to clarify confusing instructions regarding the alleged accomplice liability of Sarausad, even after repeated questions posed by a bewildered, frustrated jury, resulted in a verdict based on emotion and misunderstanding rather than a reasoned application of law.

CrR 7.5(a) (5) provides that the court may grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected by an irregularity in the proceedings of the court, by any order of the court, or by an abuse of discretion.

Generally, it is within the trial court's discretion to give supplemental instructions to the jury after it has begun deliberating. *State v. Miller*, 40 Wn.App. 483 (1985); *State v. Langdon*, 42 Wn.App. 715 (1986). However, when a jury requests clarification of a particular legal issue, the judge is obligated to clear away the confusion "with concrete accuracy". *Bollenbach v. United States*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946).

A developed line of federal cases indicate that a trial court abuses its discretion and effectively denies a defendant due process when it refuses to clarify legal questions posed by a deliberating jury, espe-

cially when it has become clear that a simple directive to re-read instructions already given has not cleared up the source of confusion. *See United States v. Hayes*, 794 F.2d 1348 (9th Cir. 1986); *United States v. McCall*, 592 F.2d 1066 (9th Cir. 1979).

The recent Ninth Circuit case of *United States v. Warren*, 984 F.2d (9th Cir. 1993), reversed a murder conviction because the trial court had refused to clarify a legal concern posed by the jury during deliberations. The jury question concerned the defendant's state of mind and asked if the law distinguished "premeditation to kill" from "premeditation to hurt". Rather than answer in a clarifying manner, the court simply referred the jury to an instruction previously given. In reversing, *Warren* reasoned:

> In responding to the jury's inquiry in these circumstances "it is not sufficient for the court to rely on more general statements in its prior charge . . . Referring the jury back to the original instruction would not correct the apparent impression of at least some jurors that intent "to hurt" rather than "to kill" might be sufficient to convict Warren of first degree murder. The court should have provided a supplemental instruction sufficient to clear up the uncertainty that the jury had brought to the Court's attention.

Warren, 984 F.2d at 330.

In the present case the jury indicated in *three* of it questions over several days of deliberation that it was having trouble applying the concept of accomplice liability and determining Mr. Sarausad's state of mind. Two of the questions came after the jury had been told to re-read and apply instruction #46 (the accomplice definition). The final inquiry,

shortly before the verdict was returned, was posed after the jury had been *twice* instructed to re-read instruction 46. The court's final response was, again, for the jury to re-read instruction 46, among others, and to refer to the instructions as a whole. The proposed defense response would have clarified for the jury the question on which it was obviously confused: what did Mr. Sarausad have to intend or know to be accountable as an accomplice? Frustrated at its repeated effort to get help from the only available source (the court) that could clarify its legal question, the jury forged ahead, rendering a verdict based not on Mr. Sarausad's requisite knowledge that he was promoting or facilitating Ronquillo in committing the crime of intentional murder in the second degree, but based instead on its perception that he had not acted as a reasonable person under the circumstances and that he was driving the car. Even if this thought process of the jury had not been revealed by the post-verdict interview, it could have been anticipated by the given instructions and the tenor of the jury questions.

Other recent cases support the notion that a trial court is obligated to clear up obvious jury confusion about crucial legal matters. *See United States v. Nunez*, 889 F.2d 1564 (6th Cir. 1989). When a deliberating jury indicates confusion about an important legal issue, it is not sufficient for the court to rely on more general statements in its prior charge. The court must respond to questions concerning important legal issues. A conviction ought not to rest on an equivocal direction to the jury on a basic issue. *Id.*, at 1568-1569.

See United States v. Brown, 943 F.2d 1246 (10th Cir. 1991). In a conspiracy case, where the delib-

erating jury's question "went to the heart of the conspiracy concept", the trial court directed the jury to simply consider the instructions as a whole. Even though the defendant did not seek the proper supplemental instruction, the Tenth Circuit found plain error in the trial court's action, saying that the jury *may* have been confused and convicted the defendant on an improper basis and that the trial court had an obligation to resolve or attempt to resolve the jury's confusion. (emphasis supplied) *See also United States v. Zimmerman*, (943 F.2d 1204 (10th Cir. 1991), a companion case of *Brown*. Where the jury posed questions about legal responsibility three days into deliberations, it should have been instructed in a way that there was no possibility that the conviction was based on an incorrect legal basis. "There was confusion to say the least and it was plain error not to resolve it or attempt to resolve it." *Zimmerman*, at 1214.

Similarly in the present case, confusion reigned supreme throughout the jury deliberations. The jurors struggled from the outset to comprehend the concept of accomplice liability, particularly as it might apply to Cesar Sarausad. After sitting through a lengthy trial that involved the testimony of numerous witnesses, they were asked to consider relatively complicated concepts of accomplice liability as it related to different defendants with differing degrees of involvement as to various degrees of multiple counts of homicide and attempted homicide.

Their initial bewilderment showed in their early communications. They were told simply to reread the instructions. But in light of the inquiries that followed, the original instructions were obviously inadequate to convey a meaningful understanding of their fact-finding responsibilities.

Even without the benefit of the jurors' explicit indications, post-verdict, about the great confusion under which they labored (see supporting declaration of defense counsel), their confusion is easily inferred from their repeated questions about accomplice liability, particularly as it related to Mr. Sarausad. The court's refusal to answer their repeated requests for guidance effectively forced them to render an uninformed verdict.

An error in criminal jury instructions requires reversal unless there is no reasonable possibility that the error materially affected the verdict or was harmless beyond a reasonable doubt. Every indication here is that the court's actions prompted the verdict.

Conclusion

The trial court's refusal to clarify its earlier instructions as to the alleged accomplice liability of Mr. Sarausad confused and confounded a frustrated jury. Even after its verdict the jury did not understand the given instructions or its proper role as fact-finder.

The trial court's refusal to answer the pressing questions of the jury concerning critical legal questions only added further doubt and misunderstanding to an already confusing situation. Mr. Sarausad has been deprived of his right to a fair trial by an impartial jury. The verdict is tainted and a new trial should be ordered.

Respectfully submitted this 14th day of November, 1994.

Michael Nance, WSBA 13933
Attorney for Defendant Sarausad

Judge Jordan

IN SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 94-c-02227-6
November 14, 1994

STATE OF WASHINGTON,
Plaintiff,

v.

CESAR SARAUSAD II,
Defendant.

DECLARATION OF DEFENSE COUNSEL IN SUPPORT OF MOTION FOR NEW TRIAL

Michael Nance declares:

I am the attorney of record for defendant Cesar Sarausad II and have appeared on his behalf at all scheduled court appearances through the trial and verdict. Following the verdict had herein, counsel for all parties were invited to meet informally with the jurors to discuss their deliberative process.

Such a meeting was convened in the courtroom during the early afternoon of November 1, 1994, in the immediate aftermath of the verdict. All of the jurors were present, although not all spoke during the meeting. Trial counsel for the state (Lisa Marchese and Susan Noonan), Anthony Savage (counsel for co-defendant Ronquillo), and I were present, together with the trial judge, Honorable Larry Jordan. Co-defendant Reyes' attorney, John Austin, was not present. None of the defendants were present. The meeting was not on the record.

The jurors spoke generally of the deliberative process and of various concerns that they had. In response to questions posed by myself, jury foreman Drew Anderson (juror #7) and others indicated that the jury did not think that Mr. Sarausad had intended to kill anyone on the day in question. He indicated that the jury did not consider and did not reach the question of what Mr. Sarausad knew of shooter Brian Ronquillo's state of mind prior to or at the time of the shooting.

The jurors indicated that they felt "very confused" about the concept of accomplice liability. One of the jurors, Jill Spadafora (juror #10), felt particularly moved by the state's argument "in for a dime, in for a dollar" in helping her to understand accomplice liability. At least one juror indicated that they became "very tired" of having to read and re-read instruction #46 (the accomplice definition). Particularly troublesome to this juror and to others was the dual reference within the same definition to "a crime" and "the crime". Another juror indicated that they could not get past consideration of (go lower than) murder in the second degree as to Mr. Sarausad because of the instructional language.

In a subsequent telephone conversation with Patricia Shiley (juror no. 6), she expressed frustration at being asked to assign a degree of responsibility to Mr. Sarausad. She indicated that the jury had very little "concrete to go on" and finally based Mr. Sarausad's conviction on the fact that a reasonable person would have realized something serious could happen under the circumstances and the fact that he was driving the car and had more control than others. According to Ms. Shiley, the jury never reached any reasonable agreement on his degree of

responsibility as an accomplice. She indicated that the instructions were not clear, that the jury was confused over the instructions, but she and others felt that, as to Mr. Sarausad, they lacked the option to go lower than one degree of responsibility below that of co-defendant Ronquillo.

I certify that the foregoing is true and correct to the best of my knowledge and belief.

_____ _____

Date and Place Michael Nance

Judge Jordan

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 94-c-02227-6
December 7, 1994

STATE OF WASHINGTON,
Plaintiff,

v.

CESAR SARAUSAD II,
Defendant.

DEFENDANT OF SARAUSAD'S MOTION
FOR RECONSIDERATION OF
MOTION FOR NEW TRIAL

Defendant Cesar Sarausad II, by and through undersigned counsel and pursuant to CrR 7.6, moves the court for reconsideration of its order of November 30, 1994 denying the defense motion for a new trial. This motion is based on the due process clauses of the federal and state constitutions, the earlier declaration and memorandum submitted with the original motion, and the new declarations of jurors Patricia Stevens and Stanley Parker and defense counsel.

Submitted this 7th of December, 1994.

Michael Nance # 13933
Defense Attorney

Judge Jordan

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 94-c-02227-6
December 7, 1994

STATE OF WASHINGTON,
Plaintiff,

v.

CESAR SARAUSAD II,
Defendant.

DECLARATION OF MICHAEL NANCE IN SUPPORT OF DEFENSE MOTION FOR NEW TRIAL

Michael Nance states as follows:

I am the attorney of record for defendant Cesar Sarausad and have represented him through all critical stages of the proceedings herein. Following the jury verdict I contacted several of the jurors to discuss their deliberative process. One juror, Patricia Stevens, agreed to sign a declaration in support of a defense new trial motion. I reduced her verbal comments to writing in the form of a draft of a formal declaration and sent it to her to review. After several refinements I produced a final version which accurately reflected her verbal comments to me and which she has since signed and which will be submitted in support of the motion.

Independent of my actions, on December 1, 1994, Ms. Stevens contacted fellow juror Stanley Parker by

telephone and informed him that she would be signing a declaration for the court's consideration. She then read to Mr. Parker the verbatim language of her declaration. Later that same day I spoke by telephone with Mr. Parker. He told me that he had spoken with Ms. Stevens, had heard her read her formal declaration, and that he agreed with it in every way. He indicated to me that he, too, would be willing to sign a similar declaration. Because of his extremely busy work schedule during the holiday season (he delivers for UPS), however, it was very inconvenient for him to travel to downtown Seattle to meet with me.

The following day, December 2, 1994, I met personally with Ms. Stevens in my office to finalize the signing of her declaration. We agreed that I would prepare another declaration in Mr. Parker's name, utilizing the same language as her own, and have her personally deliver the declaration to Mr. Parker's workplace on the Eastside. Mr. Parker has since received, signed and returned the declaration.

Although the language of Mr. Parker's written declaration is identical to that of Ms. Stevens, it is completely consistent with my previous telephone conversations with him, and it accurately captures the substance and spirit of those comments. Before signing, of course, Mr. Parker was free to make changes or additions to the declaration as he saw fit.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

_____ _____

Date and Place Michael Nance

Judge Jordan

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 94-c-02227-6
December 7, 1994

STATE OF WASHINGTON,
Plaintiff,

v.

CESAR SARAUSAD II,
Defendant.

DECLARATION OF PATRICIA STEVENS IN SUPPORT OF DEFENSE MOTION FOR NEW TRIAL

Patricia Stevens states as follows:

I was recently selected as a juror in the above-styled case, in which the defendant Cesar Sarausad II was charged with murder in the first degree (count I), two counts of attempted murder in the first degree (counts III and IV), and assault in the second degree (count V). I was present during all phases of the trial and participated fully in the jury deliberations that followed the presentation of the evidence. After lengthy deliberations we convicted Mr. Sarausad (Cesar) of second degree intentional murder, two counts of attempted second degree intentional murder, two counts of attempted second degree intentional murder and assault in the second degree.

During our deliberations we considered all the written instructions provided to us by the court and

tried to apply the law as contained in the instructions to each of the three defendants on trial. We decided early in our deliberations that co-defendant Brian Ronquillo was guilty as charged. We spent most of the balance of our deliberations in trying to determine whether the state had proved its case against Cesar.

Some of us did not believe that Cesar intended to do anything more than participate in a fight at Ballard High School. I and some of the other jurors believed that he never intended to see anyone killed or shot. I did not believe that there was proof beyond a reasonable doubt that Cesar even knew of the presence of a gun in the car or that he had knowledge of Ronquillo's intent to shoot a gun that day or to kill anyone.

We jurors found the jury instructions very confusing, particularly as they applied to Cesar. We never understood, once we convicted Ronquillo as charged and made Cesar an accomplice, if we have the latitude to convict him of a lesser crime than intentional murder in the second degree. We tried several times to get clarification from the judge as to how the "intent" requirement applied to Cesar. The main response we got was to "re-read instruction #46", the accomplice definition. We did re-read that instruction, along with others, be we remained confused, even after the verdict was announced in open court.

When we could not get clarification from the court we interpreted the instructions as saying that, under no circumstances, could we find Cesar guilty of anything less than an intentional murder in the second degree. This greatly troubled me because, factually, I

felt Cesar was probably guilty of something, but certainly not murder or attempted murder.

I understand now that Cesar could have been an accomplice to a manslaughter and not have been an accomplice to intentional murder. But I did not believe that was possible during the deliberations, nor did the rest of the jury. If I had known that during deliberations, I would never have agreed to go along with the rest of the jurors in returning guilty verdicts on intentional murder, the attempted intentional murders, and intentional assault. I would have held out for no more than a manslaughter conviction, because I believe that charge more accurately describes Cesar's crime and his responsibility.

I believe that jury confusion during the deliberations has resulted in Cesar being convicted of crimes that he did not commit. I feel this is a grave injustice.

I certify under penalty of perjury under the laws of the State of Washington that I have read the foregoing and believe it to be true and correct to the best of my knowledge and belief.

_____ _____

Date and Place Patricia Stevens

Judge Jordan

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 94-c-02227-6
December 7, 1994

STATE OF WASHINGTON,
Plaintiff,

v.

CESAR SARAUSAD II,
Defendant.

DECLARATION OF STANLEY PARKER IN SUPPORT OF DEFENSE MOTION FOR NEW TRIAL

Stanley Parker states as follows:

I was recently selected as a juror in the above-styled case in which the defendant Cesar Sarausad II was charged with murder in the first degree (count I), two counts of attempted murder in the first degree (counts III and IV), and assault in the second degree (count V). I was present during all phases of the trial and participated fully in the jury deliberations that followed the presentation of the evidence. After lengthy deliberations we convicted Mr. Sarausad (Cesar) of second degree intentional murder, two counts of attempted second degree intentional murder and assault in the second degree.

During our deliberations we considered all the written instructions provided to us by the court and tried to apply the law as contained in the instructions

to each of the three defendants on trial. We decided early in our deliberations that co-defendant Brian Ronquillo was guilty as charged. We spent most of the balance of our deliberations in trying to determine whether the state had proved its case against Cesar.

Some of us did not believe that Cesar intended to do anything more than participate in a fight at Ballard High School. I and some of the other jurors believed he never intended to see anyone killed or shot. I did not believe that there was proof beyond a reasonable doubt that Cesar even knew of the presence of a gun in the car or that he had knowledge of Ronquillo's intent to shoot a gun that day or to kill anyone.

We jurors found the jury instructions very confusing, particularly as they applied to Cesar. We never understood, once we convicted Ronquillo as charged and made Cesar an accomplice, if we had the latitude to convict him of a lesser crime than intentional murder in the second degree. We tried several times to get clarification from the judge as to how the "intent" requirement applied to Cesar. The main response we got was to "re-read instruction #46", the accomplice definition. We did re-read that instruction, along with others, but we remained confused, even after the verdict was announced in open court.

When we could not get clarification from the court we interpreted the instructions as saying that, under no circumstances, could we find Cesar guilty of anything less than an intentional murder in the second degree. This greatly troubled me because, factually, I felt Cesar was probably guilty of something, but certainly not murder or attempted murder.

I understand now that Cesar could have been an accomplice to a manslaughter and not have been an accomplice to intentional murder. But I did not believe that was possible during the deliberations, nor did the rest of the jury. If I had known that during deliberations, I would never have agreed to go along with the rest of the jurors in returning guilty verdicts on intentional murder, the attempted intentional murders, and intentional assault. I would have held out for no more than a manslaughter conviction, because I believe that charge more accurately describes Cesar's crime and his responsibility.

I believe that the jury confusion during the deliberations has resulted in Cesar being convicted of crimes that he did not commit. I feel this a grave injustice.

I certify under penalty of perjury under the laws of the State of Washington that I have read the foregoing and believe it to be true and correct to the best of my knowledge and belief.

_____ _____

Date and Place Stanley Parker

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION I

No. 35875
Dec. 18, 1996

STATE OF WASHINGTON,
Respondent,

v.

CESAR FRASCO SARAUSAD II,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY

THE HONORABLE LARRY A. JORDAN

BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

SUSAN J. NOONAN
Assistant Chief
Deputy Prosecuting Attorney

LISA M. MARCHESE
Senior Deputy Prosecuting Attorney

W554 King County Courthouse
Seattle, Washington 98104
(206) 296-9000

* * * *

> (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime. "Aid," means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

WPIC 10.51. RCW 9A.08.020 (3) (a).

The defendant argues that use of the phrase "the crime" in RCW 9A.08.020 and WPIC 10.51 means that the state must prove that he specifically intended to help co-defendant Ronquillo commit murder for him to be found guilty of the instant crimes. Appellant's Opening Brief, pp. 29-33. The defendant's interpretation, however, is contrary to the well-settled law of accomplice liability in Washington.

Accomplice liability represents a legislative determination that one who participates in a crime is guilty as a principal, regardless of the degree of participation. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991); *State v. Randle*, 47 Wn. App. 232, 734 P.2d 51 (1987), *rev. denied*, 110 Wn.2d 1008 (1988).

First, the accomplice liability statute predicates criminal liability on general knowledge of a crime and not on specific knowledge of the elements of the principal's crime. *Hoffman*, 116 Wn.2d at 104; *State v. Davis*, 101 Wn.2d 654, 657-58, 682 P.2d 883 (1984);

State v. Peterson, 54 Wn. App. 75, 78-79, 772 P.2d 573, *rev. denied*, 113 Wn.2d 1007 (1989); *Randle*, 47 Wn. App. at 237. The State need not prove that the principal and the accomplice shared the same mental state. *State v. Bockman*, 37 Wn. App. 474, 682 P.2d 925, *rev. denied*, 102 Wn.2d 1002 (1984). Rather, it is the knowledge that his actions or presence will facilitate another in the commission of a crime by providing assistance that makes the accomplice liable. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); *State v. Guloy*, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985), *cert. denied*, 106 S. Ct. 1208 (1986); *Bockman*, 37 Wn. App. at 491; *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303, *rev. denied*, 119 Wn.2d 1003 (1992).

* * * *

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

No. 45550-8-1
October 12, 1999

In re the Personal Restraint of CESAR SARAUSAD II,
Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Larry Jordan, Judge

OPENING BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

PATRICIA NOVOTNY
Attorney for Petitioner
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* * * *

A ASSIGNMENTS OF ERROR

1. Ineffective assistance of trial counsel, who predicated the defense on an erroneous understanding of accomplice liability, deprived Sarausad of his constitutional right to counsel.

2. The use of bribed wiliness testimony, in violation of statute, deprived Sarausad of a fair trial.

3. The trial court's failure to instruct the jury to view the accomplice testimony with skepticism deprived Sarausad of a fair trial.

4. The state charged and the court sentenced Sarausad in a manner violative of the prohibition against double jeopardy.

5. The court erroneously construed Sarausad's crimes as comprising the same criminal conduct, and, therefore, sentenced him improperly.

6. Trial counsel and appellate counsel were ineffective for failing to raise meritorious issues, depriving Sarausad of his constitutional right to counsel.

Issues Pertaining to Assignments of Error

1. Was Sarausad's trial counsel ineffective when he predicated Sarausad's entire defense on an erroneous interpretation of Washington's law on accomplice liability?

2. Did the ineffective assistance of counsel prejudice Sarausad, resulting in a trial that was fundamentally unfair and that, in reasonable probability, would have been different had he been represented adequately?

* * * *

* * * *

Sarausad's theory at trial, as implemented by his trial attorney, Michael Nance, was that Sarausad could not be guilty as an accomplice based upon these facts. Sarausad's participation in a yelling match, even one that could lead to pushing and possibly blows, could not render him culpable for murder. This legal theory informed every aspect of Sarausad's defense from opening argument to closing statement, from the motion to dismiss at half-time to objections to instructions, from cross-examination of witnesses to, most critically, the decision to put Sarausad himself on the stand. Michael Nance constructed his defense of Sarausad on the belief that Sarausad could not be an accomplice to murder without intending to participate in more than a misdemeanor fight

> Mr. Sarausad's group drove to Ballard High School to engage in juvenile taunting and perhaps a shoving match or fist fight. No felony was planned or contemplated. Indeed, most of the kids involved did not really believe, in light of the history of macho tough talk without actual fighting, that any fight or crime would occur. Accomplice liability should not be for the unexpected, unforeseeable act of a wayward car passenger.

CP 22.

Conversely, the state argued that if Sarausad was "in for a dime," he was "in for a dollar." VRP 3010-11, 3135.

* * * *

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

No. 45550-8-1
May 15, 2001

In re the Personal Restraint of CESAR SARAUSAD II,
Petitioner.

FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR KING COUNTY

The Honorable Larry Jordan, *Judge*

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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Seattle, WA 98115
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* * * *

A ISSUES IN REPLY TO RESPONDENT'S BRIEF

1. The instructions in this case permitted the jury to convict Cesar Sarausad without finding beyond a reasonable doubt that he knew his actions would assist Brian Ronquillo in the commission of murder. Thus, the instructions did not conform to the requirements of *Roberts* and *Cronin*[1].

2. The instructions given, including the supplemental instructions, were erroneous, particularly as they failed to clarify for the confused jury the State's burden of proof on accomplice liability.

3. Because the instructions permitted conviction without proof of all the elements, because the State urged the jury to convict under the erroneous standard, because the jury was thoroughly confused about the *mens rea* element, because the trial court failed to clarify the issue for the jury, and because the evidence against Cesar as an accomplice to second degree murder, second degree attempted murder, and second degree assault was both scant and ambiguous, the erroneous instructions substantially and actually prejudiced him. Moreover, because the Supreme Court has now embraced the theory of accomplice liability that Cesar unsuccessfully advanced at trial and on appeal, any other result but reversal would be a miscarriage of justice.

* * * *

---

[1] *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000).

REPLY BRIEF

Supreme Court, U.S.
FILED
SEP 19 2008
OFFICE OF THE CLERK

NO. 07-772

IN THE SUPREME COURT OF THE UNITED STATES

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Robert M. McKenna
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REPLY BRIEF FOR THE PETITIONER

1. The Ninth Circuit Was Required To Accept That The Instructions Were Correct Under State Law

The first question upon which this Court granted certiorari is:

> "In reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law governing accomplice liability?" Br. Pet'r i.

Petitioner's opening brief explained that the Ninth Circuit erred because it refused to accept the accomplice liability instruction given in this case as a correct statement of Washington law. Br. Pet'r 26–32. Sarausad does not defend the Ninth Circuit's decision on this point. Br. Resp't at 31.[1]

This is a very important point. It means that Sarausad's jury was correctly instructed. And, since Washington's accomplice liability instruction is not unconstitutional on its face, Sarausad can show constitutional error only by establishing that the

---

[1] Sarausad apparently misunderstands the state's position in this respect. According to Sarausad: "Petitioner also claims federal courts cannot 'conduct[] an independent examination' of whether a jury could have misread a jury instruction. Br. at 26–28. This is incorrect." Br. Resp't 30. The state's opening brief argues that "the Ninth Circuit erroneously disregarded the state court interpretations of state law by conducting an independent examination of whether the instructions accurately reflect state law." Br. Pet'r at 26–27.

correct instructions were so egregious that they violated his constitutional right to a fair trial.

Sarausad claims the accomplice liability instruction is so ambiguous that it permitted the jury to convict him without proving every element beyond a reasonable doubt. The state's opening brief explained that the test for such a claim is "'"whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990))." Br. Pet'r at 32. This is a high burden. Sarausad must establish more than the mere possibility that the jury misapplied the instruction. *Boyde v. California*, 494 U.S. 370, 380 (1990). Moreover, this case comes to the Court under the deferential standard of review of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. AEDPA prohibits relief on a claim adjudicated on the merits in state court where the state court decision was not contrary to or an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

2. It Is Not Reasonably Likely That The Jury Applied The Instructions To Relieve The State Of Its Burden To Prove Sarausad's Knowledge

To convict Sarausad as an accomplice to second degree murder and second degree attempted murder, the state was required to prove Sarausad knew that his actions promoted or facilitated such crimes. Sarausad claims that there is a reasonable

likelihood that the jury misapplied the accomplice liability instruction and convicted him as an accomplice on the basis of knowledge that any crime would be committed—such as engaging in a fistfight with a rival gang—rather than knowledge that a shooting would take place. Br. Resp't 32–33.

To determine whether there is a reasonable likelihood that the jury misapplied the accomplice liability instruction, it "is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instructions and the trial record demonstrate there is no reasonable likelihood that the jury misapplied the accomplice liability instruction.

a. Taken Together, The Instructions Support The State Court's Conclusion That It Was Not Reasonably Likely That The Jury Relieved The State Of Its Burden Of Proof

The instructions to the jury, taken together, refute the claim that there is a reasonable likelihood that the jury misapplied the accomplice liability instruction to relieve the state of proving that Sarausad knew he was facilitating a shooting. The accomplice liability instruction, No. 46, states:

> "A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

> "A person is an accomplice in the commission of a crime if, *with knowledge* that it will *promote or facilitate the commission of the crime*, he or she either:
>
> "(1) *solicits, commands, encourages, or requests another person to commit* the crime or
>
> "(2) *aids or agrees to aid* another person in planning or committing the crime.
>
> "The word 'aid' means *all assistance whether given by words, acts, encouragement, support or presence.* A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. *However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.*" Pet. App. 271a (emphasis added).

The instruction requires "knowledge that [the accomplice] will promote or facilitate the commission of the crime". It requires proof of action. The instruction further makes it explicit that "more than *mere presence and knowledge of the criminal activity* of another must be shown to establish that a person present is an accomplice." Pet. App. 271a (emphasis added). Instruction No. 46 expressly informed the jury that, if knowledge of the crime, or action on the part of the accomplice to aid in the crime, is absent, there can be no accomplice liability.

Instruction No. 48, defines knowing and knowledge in this context. It states:

> "A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.
>
> "If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
>
> "Acting knowingly or with knowledge also is established if a person acts intentionally." Pet. App. 272a.

Under Instruction No. 48, to have knowledge, one must be "aware of a fact, facts or circumstances or result described by law as being a crime." Pet. App. 272a.

Taken together, these instructions inform the jury that an accomplice must take action to accomplish the crime, with knowledge that the action promotes or facilitates the crime.

Sarausad now argues that Instruction Nos. 47 and 48 make it reasonably likely that the jury misapplied the accomplice liability instruction because these instructions use the words "a crime".[2] Br.

---

[2] Instruction No. 47 deals with intent and states: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime." Pet. App. 271a.

Resp't 38–39. This argument proceeds as though jury instructions are given and applied in a vacuum. When these instructions are considered in the context of all of the instructions—including Instruction No. 46—and the crimes charged, it is apparent that the reference in them to "a crime" is to the crime charged that the jury is considering. Sarausad's argument ignores the fact that the jury was instructed to consider specific crimes including, murder in the first degree or second degree, attempted murder in the first degree, and assault with a deadly weapon—a handgun—in the second degree. JA 3–6. The jury was specifically instructed that, to convict Sarausad of any of these crimes, it must find all the elements of the crime. JA 7–16. Nothing on the face of the instructions makes it reasonably likely a jury would require only that Sarausad act with knowledge he was promoting "any crime."

b. The Closing Arguments Also Make It Evident That There Was No Reasonable Likelihood The Jury Convicted Sarausad Without Proof Of The Requisite Knowledge Element

The closing arguments also rebut Sarausad's claim that there is a reasonable likelihood the jury misapplied the accomplice liability instruction. The prosecutor consistently argued that both Sarausad and Reyes met the definition of accomplice, because they either encouraged or aided in the crimes of

murder and attempted murder, and that both defendants returned to Ballard High School knowing there would be a shooting. No one argued that they could be convicted if they intended some other crime, like having a fistfight. Sarausad's contrary argument focuses on isolated parts of the prosecutor's closing argument—the reference to "you're in for a dime, you're in for a dollar" and the prosecutor's hypothetical. This ignores the requirement that the Court consider the trial as a whole, including the prosecutor's argument as a whole, and arguments by defense counsel.

The prosecutor consistently argued that both Sarausad and Reyes acted with knowledge they were facilitating a shooting. The prosecutor argued that witnesses "acknowledged the discussion about capping, the discussion about shooting. Ladies and Gentlemen, it was discussed. They all knew what was going on." JA 47. The prosecutor told the jury that shooting was necessary because "[s]hoving wasn't going to regain their respect, a gun was. And that's why they went back for a second trip." JA 45. The prosecutor repeated this argument stating: "People have to go down so that the 23rd's can be respected, so be it. 'We've gotta shoot a gun to regain our power,' to be perceived as being tough, and Melissa Fernandes has to die, so be it. Brent Mason has to take a shot in the leg, so be it." JA 49.

Consistent with arguing that Sarausad knew a shooting would occur, the prosecutor argued that Sarausad "slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up." JA 39. The prosecutor explained that "Sarausad drove

slow enough for [Ronquillo] to fire not one shot, not two shots, but to essentially empty this magazine." JA 46. The "witnesses heard ten [shots]." JA 46. Sarausad "was driving the car in a manner which allowed [Ronquillo] to do it." JA 117.

The arguments by the defense counsel were consistent: Reyes' counsel argued that he did not encourage the shooting, and Sarausad's counsel argued that Sarausad had no knowledge about the shooting. For example, Sarausad's counsel also addressed the knowledge element: "With respect to every charged crime, Counts I through V, and the lesser included crime that you will be considering, it's the same question for you, did Cesar Sarausad *have knowledge that his assistance in driving the car would promote or facilitate the charged crime* or a lesser crime being charged." JA 83–84 (emphasis added). He argued there was no evidence that Sarausad knew that there would be a shooting. JA 92 ("Not a single witness testified that he expected a shooting.") .

Sarausad cannot reasonably dispute that the arguments of both the prosecution and the defense, taken as a whole, addressed Sarausad's knowledge that he was facilitating a shooting. *See* Br. Pet'r 40–49. Sarausad, however, argues the prosecutor's use of a hypothetical and the phrase "if you're in for a dime, you're in for a dollar" did not correctly "limit accomplice liability". Br. Resp't 44–45. Neither the hypothetical nor the phrase creates a likelihood that the jury misapplied the instruction when they are viewed as a whole in the context of an overall correct argument. The hypothetical and phrase were used after Sarausad's counsel incorrectly argued that,

even if Ronquillo had premeditated the shooting, "the big question for you [the jury] as to Cesar is whether he shared those intentions . . . ." JA 98. This incorrectly stated the law. An "accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *State v. Roberts*, 142 Wash. 2d 471, 512, 14 P.3d 713 (2000).

The prosecutor used the hypothetical and phrase while explaining how Sarausad's counsel was incorrect. She stated:

> "The defendant, Mr. Sarausad's lawyer says that an accomplice has to have the same mental state as the person doing the shooting. Cesar Sarausad, Jerome Reyes also had to have premeditated intent. Not true, not true. And that's not what the instruction says.
>
> "And I've told you the old adage, you're in for a dime, you're in for a dollar. . . . The example I gave you earlier, 'I just told my friend to hold the arms down of this person while he hit him, I didn't tell him to kill him, I'm not guilty of anything.' If you're in for a dime, you're in for a dollar." JA 123.

After the prosecutor used the phrase "you're in for a dime, you're in for a dollar," she identified what she meant by "the dime"—the shooting. Her next words were:

> "When they rode down to Ballard High School that last time, I say they knew what they were up to. They knew they were there to commit a crime, to disrespect the gang, to

> fight, to shoot, to get that respect back. A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar." JA 123–24.

In context, this reminds the jury they did not need to find that Sarausad had the same mental state as the shooter Ronquillo, but they did have to find that Sarausad knew he was going to Ballard High School to assist in a shooting. Even when the prosecutor used the catch phrase "you're in for a dime, you're in for a dollar" to discuss liability, the "dime" was Sarausad's knowledge that he was going to Ballard High School to assist in a shooting.

Finally, Sarausad also criticizes the prosecutor's statement that Reyes "'set[] the wheels in motion, by simply calling his friends, getting them together, saying, "Let's go avenge this problem[.]"'" Br. Resp't 9 (quoting JA 37). In context, the prosecutor's next words described a person with the proper knowledge, a person who solicits another to "[g]o commit this crime and report back to me". JA 37. Seconds later, she adds: "You have to be present, you have to be ready to assist, and you have *to know* that your assistance is causing *the crime* to unfold." JA 38 (emphasis added). She then immediately argues that Reyes returned knowing the rival gang had guns and that it would be "ludicrous" to return with only fists. JA 39. In context, the prosecutor urges only the correct application of the accomplice liability instruction, based on Reyes' knowledge that guns were to be used.

c. The Jury's Questions And The Court's Responses Do Not Establish A Reasonable Likelihood That The Jury Misapplied The Accomplice Liability Instruction

Sarausad argues the fact that the jury asked three questions related to accomplice liability makes it reasonably likely the jury misunderstood that instruction.[3] And he argues that the judge erred in responding by advising the jury to reread the accomplice liability and related instructions, and to reread the instructions as a whole. Br. Resp't 40–43.

This claim is not well taken. In the first place, it is highly significant that the accomplice liability instruction was correct as a matter of state law. Sarausad's "burden is especially heavy because no erroneous instruction was given [and an] omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

In *Weeks v. Angelone*, 528 U.S. 225 (2000), the Court rejected the claim that the Constitution requires a judge to give supplemental instructions

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[3] Sarausad's supplemental appendix to his brief contains declarations by jurors and counsel alleging the jury was confused by the accomplice liability instructions. Br. Resp't Suppl. App. 31–36. Although Sarausad indirectly attempts to rely on this inadmissible evidence by appending the declarations to the brief and discussing them in his statement of the case, both the Ninth Circuit and the district court judge recognized these declarations are inadmissible under Evidence Rule 606(b), and should not be considered. Pet. App. 78a, 128a–29a.

when the "jury was adequately instructed [and] the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry[.]" *Weeks*, 528 U.S. at 234. "A jury is presumed to follow its instructions [and] understand a judge's answer to its question." *Id.* "To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer." *Id.* In addition, like the jury in *Weeks*, the jury in Sarausad "demonstrated that it was not too shy to ask questions, suggesting that it would have asked another if it felt the judge's response unsatisfactory." *Id.* at 235–36.

Sarausad's efforts to distinguish *Weeks* lack substance. First, Sarausad argues that *Weeks* does not stand for the proposition that it is never error for a court, having correctly instructed the jury, to redirect the jury's attention to the instructions in response to a question from the jury.[4] According to Sarausad, such a proposition would be inconsistent with *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Shafer v. South Carolina*, 532 U.S. 36 (2001), and *Armstrong v. Toler*, 24 U.S. 258 (1826). Sarausad apparently cites these cases for the proposition that whenever a jury asks a question about its instructions, it means that the jury does not and *will not* be able to understand and apply the

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[4] Sarausad also overstates the state's argument. It is not that an additional instruction could "never" be required. However, once there is a proper instruction, it is difficult to show an abuse of discretion to refuse an amplifying instruction. *E.g.*, *United States v. Park*, 421 U.S. 658, 675 (1975).

instructions without supplemental instruction from the court. Br. Resp't 40–41. None of the cited cases stand for Sarausad's proposition, and it would be inconsistent with the rule that the jury is presumed to understand the judges answers to its questions and that it will ask additional questions if it does not. Indeed, this Court in *Armstrong* explained, "[h]ad the jury desired further information, they might, and probably would, have signified their desire to the Court." *Armstrong*, 24 U.S. at 279.

Moreover, *Simmons* and *Shafer* both involved improper instructions where the prosecution argued for death based on the future dangerousness of the defendant. Defense counsel in both cases sought an instruction that a sentence of life in prison meant that the defendant would be ineligible for parole. In *Simmons*, in response to the jury's question, "Does the imposition of a life sentence carry with it the possibility of parole?" (*Simmons*, 512 U.S. at 160), the judge told the jury, "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning." *Id.* (alteration in original). The Court found constitutional error "[b]ecause petitioner's future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility [so] the instruction issued by the trial court in this case does not satisfy due process." *Id.* at 171; *see also Shafer*, 532 U.S. at 53 (describing similar error).

Next, Sarausad relies on the fact that defense counsel objected to the judge's response to the jury's questions. However, the objections actually support the conclusion that the jury was not reasonably likely to convict Sarausad on the basis of knowledge of any crime because the objections were not based on any such concern.

On October 25, 1994, the jury inquired: "Request clarification on instructions no. 11 & no. 12 element (3); does the 'intent' apply to (the defendant only) or to (the defendant or his accomplice)?" JA 131. Reyes' defense counsel "suggest[ed] a reply referring the jury to instructions 6, 46, and 47 as well as the instructions as a whole." JA 131–32. The judge adopted this suggestion, except the judge did not refer the jury to Instruction No. 6. All defense counsel took exception to omitting Instruction No. 6. JA 132. (Instruction No. 6 is not at issue in this case.)

Three days later, the jury asked: "Reference: Instruction No. 17 in 'the crime of murder in the second degree (intentional)' Question: Does intentional apply to only the Defendant or only his accomplice?" JA 135. The prosecutor and Ronquillo's and Reyes' counsel had "no objection to the Court giving the same reply it gave to the jury's previous inquiry on Oct. 25, 1994." JA 135–36. Sarausad's counsel "maintain[ed] the same objection it previously made orally and per his brief filed on that date." JA 136. Sarausad did not object to the accomplice liability Instruction No. 46. Rather, he objected to Instructions No. 12, 17, 23, 27, 31, 38, 41, and 44 because he contended that they would permit Sarausad to be convicted "on the basis of his or 'his

accomplice's' actions and intentions." Br. Resp't Suppl. App. 15. Sarausad's counsel expressed no concern that the jury would misapply the instructions to convict him on the basis of knowledge of any crime. The judge told the jury: "Refer to instruction 45 and 46 and consider the instructions as a whole." JA 136.

Three days later, the jury asked: "We are having difficulty agreeing on the legal definition and concept of 'accomplice.' Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?" JA 137 (alteration in original). The judge's proposed response was: "Reread instructions #45, 46, 47, and 48, and consider your instructions as a whole." JA 138. Counsel for Ronquillo suggested "'refer to your instructions', but has no objection to the court's proposed reply." JA 138. Reyes' counsel suggested "'see instruction 46 and consider your instructions as a whole', but has no obligation [sic] to the court's proposed reply." JA 138. Sarausad's counsel suggested either

> "(1) 'no'; or (2) 'reread instruction #46 (accomplice definition) with the added clarification: to be an accomplice one (1) must promote or facilitate the crime being considered by the actor, (2) the actor must have the mental state required for the crime, and (3) the accomplice must know that the actor had the required mental state.[']" JA 138.

The court gave its proposed response to the jury over Sarausad's objection. JA 138. And correctly so, because the clarification to Instruction No. 46 proposed by Sarausad's counsel was improper as a matter of Washington law. "[A]n accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *Roberts*, 142 Wash. 2d at 512.[5] Most significant is the point that Sarausad's counsel did not seek to clarify that the state needed to prove that Sarausad had knowledge he was facilitating a shooting at Ballard High School, rather than any crime. The fact is that neither Reyes' nor Sarausad's counsel expressed concern that the jury would apply the accomplice liability instruction in the way Sarausad now argues to this Court.

d. Evidence Outside The Trial Record Is Inherently Weak In Evaluating Whether A Jury Misapplied An Instruction

In determining whether there is a reasonable likelihood that the jury misapplied an instruction in a way that violated the Constitution, the Court considers "the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Sarausad places substantial

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[5] Sarausad's counsel later admitted "that this proposed supplemental instruction overstates the mens rea required of an accomplice as defined in *Roberts*. Supplemental Reply Brief in Support of Personal Restraint Petition at 7, n.4." Pet. App. 208a n.9.

reliance on evidence outside the trial record. Br. Resp't 33–38.

External evidence is of limited value for the reason that the understanding of a jury or an appellate court necessarily depends upon the instructions given and the arguments made—the context of the trial. The Court explained this point in *Boyde v. California*, 494 U.S. 370 (1990). *Boyde* rejected the contention that the arguments of prosecutors in other cases were relevant in determining the validity of a jury instruction in the case before the Court. The Court found "no merit to the contention . . . that arguments of prosecutors in *other* California cases bear on the validity of the factor (k) instruction in this case." *Boyde*, 494 U.S. at 386 n.6. The Court reasoned that the defendant's "jury obviously was not influenced by comments made in other California capital trials. Nor do we think the fact that prosecutors in other cases may have pressed a construction of factor (k) that would cause the sentencing proceedings to violate the Eighth Amendment means that reasonable jurors are likely to have arrived at an [sic] such an interpretation." *Id.* The few decisions cited by Sarausad turn on the context of the criminal trials—including the instructions given to the jury and the arguments of counsel—and the arguments made on appeal. They do not provide any information about whether there was a reasonable likelihood that the jury in this case misapplied the correct accomplice liability instruction in a way that violated the Constitution.

Sarausad relies heavily on the direct appeal in this case. In an unpublished opinion, the

Washington Court of Appeals stated that Sarausad could be convicted without proving that "Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day[.]" Pet. App. 266a; Br. Resp't 33–34. However, the court's observation that the state could convict Sarausad without proving that he knew there was a potential for gunplay that day was made in the context of Sarausad's challenge to the sufficiency of evidence, on the grounds "that he was merely present at the scene, and was therefore insufficient to support his conviction of murder in the second degree based on accomplice liability." Pet. App. 265a. The court did not focus on how the instructions would be applied by a jury; it addressed Sarausad's argument that the law requires shared intent. Pet. App. 258a–59a.

The state court decision on direct review, thus, does not support Sarausad's claim. It is a court's misstatement regarding accomplice liability where the language at issue in this case was not in dispute. Notably, the state court that considered Sarausad's personal restraint petition simply acknowledged that "we erred." Pet. App. 205a. It did not find ambiguity in the instruction. At best, then, the state court decision on direct review indicates that a court may misstate a correct and otherwise straight forward instruction in a context where its relevant language is not directly at issue.

Sarausad next points to other decisions that Sarausad claims reveal a long standing disagreement about the meaning of accomplice liability in Washington. Br. Resp't 34–36. In *In re the Personal Restraint Petition of Domingo*, 155 Wash. 2d 356, 367, 119 P.3d 816 (2005), the

Washington Supreme Court expressly rejected Sarausad's view because "a review of the cases relied on by petitioners reveals that the Courts of Appeal, while sometimes using imprecise or overbroad language, *rarely if ever deviated from the holdings of Roberts, Cronin, and Davis* during the 16 years separating those decisions."[6] Moreover, *Boyde* teaches that the arguments by counsel in other cases do not inform the Court about what the jury understood in a different case. *Boyde*, 494 U.S. at 386 n.6.

Finally, Sarausad offers, as external evidence, the fact that the jury did not receive an explanation of the accomplice liability instruction like that contained in parties' briefs or the decision of the court dealing with accomplice liability. Br. Resp't 36–38. There is no merit to this claim. Jury instructions, the briefs of lawyers, and the decisions of courts serve very different purposes. "The purpose of jury instructions 'is to inform the jury of its function, which is the independent determination of the facts, and the application of the law, as given by the court, to the facts found by the jury.' 2A Charles

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[6] Sarausad also overstates the state cases. For example, *State v. Boyd*, 21 Wash. App. 465, 476 n.1, 586 P.2d 878 (1978) (Br. Resp't 2), examined the correct instruction, rejected a shared intent requirement, and did not misstate accomplice law. *State v. Rice*, 102 Wash. 2d 120, 683 P.2d 199 (1984) (Br. Resp't 2), also deals with the "shared intent" theory and, contrary to Sarausad's argument, makes no assumptions about the accomplice liability instruction. *Id.* at 125 (accomplice instruction "was not relevant"). *In re the PRP of Smith*, 117 Wash. App. 486, 73 P.3d 386 (2003) (Br. Resp't 35), involved the wrong instruction, but, the opinion in *Domingo* specifically rejected the quote from *Smith* cited by Sarausad.

A. Wright, *Federal Practice and Procedure: Criminal* § 485 (3d ed. 2000)." *United States v. Mikutowicz*, 365 F.3d 65, 70 (1st Cir. 2004). The purpose of briefs is to make arguments to the court about how the legal issues in the case should be resolved. The purpose of the decision of the court is to resolve the legal issues in the case, and provide guidance to lower courts, counsel, and the public about the law.

Because they serve different functions, briefs and opinions are necessarily more comprehensive and include greater detail in making and resolving arguments. Instructions are just that—instructions to guide the jury. There is no basis to claim that the jury in this case was misled because the briefs of counsel and the opinions of the court discussed accomplice liability in greater depth than the jury instructions.

3. The Decision Of The State Court Was Not Objectively Unreasonable

The Ninth Circuit also should be reversed because Sarausad fails to meet the deferential standard of review under 28 U.S.C. § 2254(d). To prevail, Sarausad not only must demonstrate that there was a reasonable likelihood that the jury misapplied the accomplice liability instruction to relieve the state of its burden to prove the knowledge element, he also must satisfy the deferential standard of review under § 2254(a)(1).

Sarausad argues that the state court's adjudication of his claim was an unreasonable application of clearly established federal law. A state court decision is an unreasonable application of clearly established federal law under § 2254(d)(1)

only if the state court unreasonably applies the holdings of this Court to the facts of the prisoner's case. *Holland v. Jackson*, 542 U.S. 649, 652 (2004). The state court decision must be objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003). Whether a decision is objectively unreasonable depends upon the specificity of the rule. Here, the clearly established law is a general rule that, in considering a claim that a jury instruction is ambiguous, the court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle*, 502 U.S. at 72 (internal quotation marks omitted). This is exactly the type of general rule where state courts have "more leeway . . . in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

a. The PRP Court Was Not Objectively Unreasonable In Rejecting Sarausad's Claim Of Entitlement To Supplemental Jury Instructions

Sarausad argues that the state court's adjudication was objectively unreasonable because the court, in his personal restraint petition (PRP), framed the constitutional question in an unduly narrow way by failing to address whether the judge should have given a supplemental accomplice liability instruction. Br. Resp't 46–49. Sarausad analogizes this case to *Wiggins v. Smith*, 539 U.S. 510 (2003). Br. Resp't 23, 46. Contrary to this argument, in considering Sarausad's personal restraint petition, the PRP court examined this claim. *Wiggins* is not on point.

Wiggins involved a claim of ineffective assistance of counsel. The defendant's "claim stem[ed] from counsel's decision to limit the scope of their investigation into potential mitigating evidence." *Wiggins*, 539 U.S. at 521. Defense "counsel attempt[ed] to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternative strategy instead." *Id.* However, under *Strickland v. Washington*, 466 U.S. 668 (1984), "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins*, 539 U.S. at 521–22 (quoting *Strickland*, 466 U.S. at 690–91). The "state court merely assumed that the investigation was adequate." *Id.* at 527. The court's "*assumption that counsel's investigation was adequate reflected an unreasonable application of Strickland.* In deferring to counsel's decision not to present every conceivable mitigation defense despite the fact that counsel based their alleged choice on an inadequate investigation, the Maryland Court of Appeals further unreasonably applied *Strickland*." *Id.* at 512 (emphasis added).

Unlike the state court in *Wiggins*, the PRP court did not assume that the jury was properly instructed or that no supplemental instruction was required. Rather, the PRP court examined the instructions and fully adjudicated Sarausad's arguments. Thus, the PRP court did not frame the

constitutional question too narrowly. Similarly, because the PRP court adjudicated these questions, there is no merit to Sarausad's related argument that the PRP court should be reviewed de novo. Br. Resp't 23 (citing *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

First, the PRP court expressly recognized Sarausad's claim that the judge erred by failing to give supplemental instructions. According to the PRP court:

> "Sarausad vigorously argues that under the unique facts of this case, *the trial court's failure to provide a supplemental instruction in response to the jury's persistent inquiries relieved the State of its burden to prove its case beyond a reasonable doubt*—notwithstanding that the accomplice liability instructions complied with the requirements of *Roberts*[.]" Pet. App. 208a (emphasis added).

Similarly, the PRP court specifically considered Sarausad's claim that the prosecutor's argument resulted in an improper conviction "because of the way that the prosecutor argued the case to the jury." Pet. App. 208a. The PRP court stated:

> "[Sarausad] contends that because his trial took place before *Roberts* was handed down, the *prosecutor erroneously assumed, and argued, that the jury could find Sarausad guilty as an accomplice to murder if he had the purpose to facilitate an offense of any kind whatsoever, even a shoving match or fist fight.*" Pet. App. 208a–09a (emphasis added).

Contrary to Sarausad's claim, the PRP court explained that it rejected his argument

> "because the court properly instructed the jury as to the law of accomplice liability and because the prosecutor made it crystal clear to the jury that the State wanted Sarausad found guilty of first degree murder, first degree attempted murder and second degree assault because he knowingly facilitated the drive-by shooting and for no other reason." Pet. App. 214a (footnote omitted).

Based on all of this, the PRP court held that "the accomplice liability instructions were sufficient, and *nothing that the prosecutor argued to the jury required a remedial or supplemental instruction from the trial court.*" Pet. App. 215a (emphasis added). "[W]e adhere to our ruling in the direct appeal that the trial court properly exercised its discretion in denying Sarausad's request for clarifying instructions." Pet. App. 215a.

Thus, contrary to the assertions of Sarausad and amici, the PRP court considered and ruled upon Sarausad's claim that the judge was required to do more in response to the jury inquiries than direct the jury to the previous instructions. The PRP court issued a sound and reasoned adjudication of the question.

Finally, the PRP court adjudication must be evaluated in light of the fact that no clearly established case law compels an additional instruction. As this Court held in *Weeks*:

> "Given that petitioner's jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, the question becomes whether the Constitution requires anything more. We hold that it does not." *Weeks*, 528 U.S. at 234.

b. The PRP Court's Conclusion With Respect To The Prosecutor's Argument Was Not Objectively Unreasonable

Sarausad next claims that the state court decision was objectively unreasonable because the PRP court misconstrued the prosecutor's use of the catch phrase "you're in for a dime, you're in for a dollar." Br. Resp't 49–52. The PRP court, however, rejected Sarausad's argument because it found that "[n]ot once did the prosecutor suggest to the jury that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight[.]" Pet. App. 214a–15a. Sarausad argues that the PRP court's decision was objectively unreasonable in this respect because the prosecutor's rebuttal conveyed to the jury that it could convict Sarausad if he acted only with knowledge that he was facilitating a fistfight. This is based on Sarausad's erroneous claim that his defense counsel argued the correct standard of accomplice liability, and the prosecutor disputed it with the adage "you're in for a dime, you're in for a dollar." Br. Resp't 50–51.

The PRP court's conclusion that the prosecutor never suggested that Sarausad could be convicted if he only had knowledge of a fistfight is sound. When the prosecutor used the phrase "you're in for a dime, you're in for a dollar" to correct Sarausad's misstatement of accomplice liability, she explained what she meant by a "dime". She argued that the defendants knew they were returning to the school for a shooting. She said: "A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar." JA 123–24. The PRP court's consideration of the context of the prosecutor's argument is not objectively unreasonable. Pet. App. 213a–14a. Nor was it unreasonable for the PRP court to recognize that Sarausad's counsel had wrongly argued the intent element. *Supra* pp. 8–10 (discussing Pet. App. 215a n.11).

Next, Sarausad argues that the PRP court's decision is objectively unreasonable because it is fundamentally inequitable. Sarausad cites *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), for the proposition that "serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings[.]" *Bradshaw*, 545 U.S. at 189 (Souter, J., concurring). From this, Sarausad argues it was objectively unreasonable for the PRP court not to recognize that if the phrase "you're in for a dime, you're in for a dollar" in *State v. Cronin*, 142 Wash. 2d 568, 14 P.3d 752 (2000), could be used to argue the wrong accomplice knowledge, it was reasonably likely that the jury in this case would misapply the phrase.

There are two flaws with this argument. First, the factual underpinnings of Justice Souter's concern in *Bradshaw* are not present. The state in *Bradshaw* inconsistently claimed that a fatal shot was fired by two different defendants when it tried the defendants separately. Justice Souter explained, "Stumpf's argument is simply that a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant." *Bradshaw*, 545 U.S. at 189. The state made no such inconsistent factual claim here. Instead, this case is governed by *Boyde*, where the Court rejected the argument that a prosecutor's argument in one case was relevant to the jury's understanding of an instruction in another case. *Boyde*, 494 U.S. at 385 n.6.

Second, the consolidated cases in *Cronin*, involve incorrect instructions and prosecutors who explicitly argued to the jury that the defendant could be convicted if he was guilty of any crime. The prosecutor in *Bui* asked: "Does the state have to prove that Linh Bui knew that the person in his car would get out and shoot? No. It's the commission of a crime." *Cronin*, 142 Wash. 2d at 572. The prosecutor asked: "Did Linh Bui know by his actions when he chased after another car, when he pulled across in front of them and blocked them off in an intersection, allowed his passengers to get out, does common sense show us that he knew he was facilitating the commission of a crime? harassment? physical assault? any crime." *Id.* at 572–73. Similarly, in *Cronin*, the prosecutor relied on both an

incorrect instruction and used the catch phrase "in for a dime, in for a dollar." *Cronin*, 142 Wash. 2d at 577. Then, unlike Sarausad's case, where the "dime" was a shooting, the prosecutor in *Cronin* identified the "dime" as "the commission of the assaultive behavior that unravels into that fatal stabbing." *Id.*

Nothing in *Cronin* casts any doubt on the PRP court's adjudication.

c. Neither *Sandstrom* Nor *Mills* Support Sarausad's Claim That The PRP Court's Decision Was Objectively Unreasonable For Lack Of Reliance On Evidence Outside The Record

Finally, Sarausad argues that the decision of the PRP court is objectively unreasonable in light of *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Mills v. Maryland*, 486 U.S. 367 (1988). Sarausad argues that in those cases the Court concluded that there was a reasonable likelihood that the jury would misapply the instruction based on evidence outside the record, and that such evidence is greater in this case. Br. Resp't 53–54. This claim is not well taken. Evidence from outside the record is of limited value in determining whether it is reasonably likely that a jury misapplied an instruction. *Supra* pp. 16–17. Moreover, Sarausad's characterization of *Sandstrom* and *Mills* is not accurate.

The Court in *Sandstrom* relied primarily on the language of the instruction. The Court explained that "[p]etitioner's jury was told that '*[t]he law presumes* that a person intends the ordinary consequences of his voluntary acts' [and] the common

definition of 'presume' [is] 'to suppose to be true without proof,' *Webster's New Collegiate Dictionary* 911 (1974)[.]" *Sandstrom*, 442 U.S. at 517 (second alteration theirs). Because there were no "qualifying instructions as to the legal effect of the presumption, [the court could not] discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways." *Id.* The Court merely noted in passing that "[n]umerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways." *Id.* Unlike *Sandstrom*, in this case, there is substantial evidence from the trial court record that there was no reasonable likelihood that the jury misapplied the accomplice liability instruction.

Sandstrom is not persuasive for a second reason—it involved a presumption. Once it was reasonably likely that the jury would interpret the instruction as a conclusive presumption, the instruction was unconstitutional as a matter of law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). This is not true of the accomplice liability instruction. Even if the trial court had given an incorrect instruction, referring to "a crime" instead of "the crime", that instruction would not necessarily be unconstitutional. *See Estelle*, 502 U.S. at 74–75.

Sarausad is also incorrect in claiming that *Mills* relied to a significant degree on evidence outside the record. In fact, in *Mills*, the Court carefully analyzed both the instruction and the jury verdict form. *Mills*, 486 U.S. at 378–80. After its analysis, the Court concluded that "[o]ur reading of those parts of the record leads us to conclude that there is at least a substantial risk that the jury was

misinformed." *Mills*, 486 U.S. at 381. Only then did the Court refer in passing to the dissent in the state court. Accordingly, *Mills* does not support the conclusion that the PRP court's decision was objectively unreasonable because it did not rely on evidence outside the record.

CONCLUSION

For the reasons stated herein, the Court should reverse the decision of the Ninth Circuit and remand for further proceedings.

Respectfully submitted.

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IN THE
Supreme Court of the United States

DOUG WADDINGTON,
Petitioner,

v.

CESAR SARAUSAD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether it was objectively unreasonable for the state court to conclude that there was no reasonable likelihood the jury misunderstood the level of *mens rea* needed to find Cesar Sarausad guilty as an accomplice to murder.

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IN THE
Supreme Court of the United States

No. 07-772

DOUG WADDINGTON,
Petitioner,
v.
CESAR SARAUSAD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice.

SUMMARY OF ARGUMENT

This Court has emphasized repeatedly that the jury plays a critical and central role in the American system of criminal justice, the "historical foundation" for which "extends down centuries into the common law." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *see also United States v. Booker*, 543 U.S. 220, 230 (2005); *Carella v. California*, 491 U.S. 263, 268 (1989); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). Repeated decisions of this Court establish that the jury-trial guarantee—rooted in two constitutional provisions "of surpassing importance," the Fourteenth Amendment and the Sixth Amendment, *Apprendi*, 530 U.S. at 476-77—entitles a criminal defendant to "a jury

determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Booker*, 543 U.S. at 230 ("the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged" (internal quotation omitted)); *Neder v. United States*, 527 U.S. 1, 12 (1999) ("an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee"); *In re Winship*, 397 U.S. 358, 364 (1970).

This guarantee requires that the judge must comprehensibly instruct the jury on the applicable law. *Bollenbach v. United States*, 326 U.S. 607, 612 (1946); *Cap. Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899); *see also Starr v. United States*, 153 U.S. 614, 626 (1894) ("the influence of the trial judge on the jury is necessarily and properly of great weight"). "Jurors are not experts in legal principles; to function effectively and justly, they must be accurately instructed in the law," and the trial judge "has an affirmative constitutional obligation to use" substantively correct jury instructions "when a defendant seeks [their] employment." *Carter v. Kentucky*, 450 U.S. 288, 299 (1981).

Although jurors are presumed to follow instructions, where jury instructions are ambiguous, there is no longer any guarantee that the jurors can knowledgeably apply the law—their only source of which is the instructions themselves—to the facts

they have found. As a consequence, this Court consistently has held that when there is a reasonable likelihood that a jury misunderstood the law, as stated in the instructions, and then applied its erroneous understanding in a manner that violates the defendant's constitutional rights (*e.g.*, by failing to appreciate the distinct elements of the charged crime), reversal of the defendant's conviction is warranted. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990).

It is therefore no answer to a claim of instructional ambiguity that the challenged instruction quoted verbatim from the statute defining a crime. *See* Petitioner's Brief ("Pet'r Br.") at 27-28. Nor does it suffice that the instruction is a formally correct statement of state law in that it contains all the elements of the charged crime. *Id.* Defendants are constitutionally entitled not merely to a formally correct statement of the law, but rather to an instruction reasonably calculated to afford the jury a substantively accurate understanding of what the governing law is: in particular, a substantively accurate understanding of the discrete elements of the charged offense under state law. *See Boyde*, 494 U.S. at 380; *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

A federal court thus remains well within the limits prescribed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") when it inquires—not whether a challenged instruction contained an error

of state law (that is beside the point)—but rather, whether the jury applied the instruction in a manner that violated federal law. Any lesser inquiry would, at the expense of the constitutional jury-trial guarantee, wrongly insulate from review formally correct, but substantively ambiguous, instructions on state law. To be sure, "a mere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas. Some erroneous state law instructions, however, may violate due process and hence form the basis for relief, even in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 348-49 (1993) (O'Connor, J., concurring in judgment) (emphasis added).

In the circumstances of this case, the state courts unreasonably adjudicated Respondent's claim that the jury was hopelessly confused as to a required element of accomplice liability. The Ninth Circuit correctly concluded that there is a reasonable likelihood that the jury did not find the requisite "knowledge" under state law, which violated Respondent's jury-trial guarantee.

ARGUMENT

I. GIVEN THE IMPORTANCE OF JURY INSTRUCTIONS, AN AMBIGUOUS STATUTE, WITHOUT MORE, CANNOT BE THE BASIS FOR A CONSTITUTIONALLY SUFFICIENT INSTRUCTION.

A. Jury Instructions Are Critical To Safeguard the Constitutional Right to a Jury that Understands Every Element of the Charged Crime.

The jury-trial guarantee, "the only one to appear in both the body of the Constitution and the Bill of Rights," *Neder*, 527 U.S. at 30 (Scalia, J. concurring in part and dissenting in part), presupposes that a jury will be instructed precisely and comprehensibly as to each element of the law it must apply to a given set of facts. *See id.* at 12; *Bollenbach*, 326 U.S. at 612-14.

The trial judge functions as an influential intermediary between the jury and the law as it exists on the books. Rather than simply providing jurors with copies of relevant criminal provisions, and instructing them to apply that law to the evidence, the judge must explain with clarity each element of the conduct that would constitute a crime. *See Bollenbach*, 326 U.S. at 612-13 ("Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the

jury the required guidance by a lucid statement of the relevant legal criteria."); *Tavoulareas v. Piro*, 817 F.2d 762, 808 (D.C. Cir. 1987) (Ginsburg, J., concurring) ("To arm the jury with the information needed for the intelligent performance of its task, the judge might first endeavor to speak the language of the jurors, and avoid the jargon of the legal profession."); Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 Tenn. L. Rev. 701, 708 (2000) ("The essence of the instructional process is that specialized knowledge from one domain (law) is communicated to another domain (the laity, the 'ordinary, reasonable people,' the fact-finders)."); *see also* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook. L. Rev. 1081, 1084 (2001) ("[C]ases and statutes are written primarily for an audience of lawyers and, thus, have never been intended to be read and understood by the lay public."). The goal of the instructional process is "to ensure that the applicable law is stated accurately and completely." Dumas, *supra*, at 708.

Particularly in complex areas of law, and as to complex issues such as knowledge and intent, courts have recognized that the judge must be careful to instruct the jury in a way that ensures jurors' accurate understanding of the legal principles involved. *See, e.g.*, *Tavoulareas*, 817 F.2d at 809 (Ginsburg, J., concurring) (observing, in libel action, that "[c]areful efforts by judges to make the legal rules genuinely accessible to jurors may reduce some

of the turbulence in this unsettling area of the law"); *State v. Alexander*, 643 A.2d 996, 1000 (N.J. 1994) (observing, in context of state's "unusually-constructed criminal statute," that "[a] court's obligation properly to instruct and to guide a jury includes the duty to clarify statutory language that prescribes the elements of a crime when clarification is essential to ensure that the jury will fully understand and actually find those elements in determining the defendant's guilt").

The judge's "affirmative constitutional obligation" to instruct the jury, *Carter*, 450 U.S. at 299, is amplified when the jury, after being instructed, asks questions about the governing law, because the jury thereby displays its lack of understanding regarding the pertinent legal principles. *See Bollenbach*, 326 U.S. at 612-13 ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."); *see also Weeks v. Angelone*, 528 U.S. 225, 242 (2000) (Stevens, J., dissenting) ("The fact that the jurors asked this question about that instruction demonstrates beyond peradventure that the instruction had confused them."). Here, the jury asked three questions—including one on its seventh day of deliberations—related to the *mens rea* for accomplice liability, but the judge did no more than refer the jury back to the same instructions it had already asked about.

This Court has noted the "duty of special care" that attaches when the jury displays its confusion

about any aspect of the instructions. *Bollenbach*, 326 U.S. at 612. It is for this very reason that the Court's clearly established test for juror confusion inquires into whether there is a "reasonable likelihood," based on the totality of circumstances, that the jury misunderstood and "applied the challenged instruction in a way that violates the Constitution." *Estelle*, 502 U.S. at 72 (emphasis added); *see also Boyde*, 494 U.S. at 380. "The proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it." *Victor v. Nebraska*, 511 U.S. 1, 6 (1994) (citing *Estelle*, 502 U.S. at 72 & n.4).

B. The Constitutional Sufficiency of Jury Instructions Is Not Purely a Question of State Law.

Based on the above principles, the State's attempt to characterize Respondent's challenge as purely a question of state law, Pet'r Br. at 33, should be rejected. It is wrong to suggest that federal courts have no jurisdiction to inquire into the adequacy of instructions to inform jurors of the law. *See* Pet'r Br. at 25-32. Although Washington state courts have ruled that the instructions here conform to the elements of state accomplice-liability law, that does not determine the federal question whether the instructions were constitutionally sufficient to ensure the jury's understanding of the law.

Indeed, because the prevailing test under *Estelle* and *Boyde* inquires into whether the jury may have misunderstood its instructions, the State's argument that federal courts cannot "conduct[] an independent examination" of the impact of an instruction on the jury has no merit. Pet'r Br. at 26-28. The constitutional inquiry requires precisely that reviewing courts, both on direct appeal and in habeas proceedings, assess the likelihood that the jury has misapplied the challenged instruction. Notwithstanding the deference to state-court decisions owed under AEDPA, therefore, a state-court's findings on whether a jury could have misread and applied an instruction in a way that violates the Constitution (to the extent it makes any such findings) are not binding on federal courts sitting in habeas if they are unreasonable. Those findings are not determinations of state law, but instead are determinations of whether the defendant's federal constitutional rights have been upheld. "A mere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas. Some erroneous state law instructions, however, may violate due process and hence form the basis for relief, even in noncapital cases." *Gilmore*, 508 U.S. at 348-49 (O'Connor, J., concurring).

This Court's jurisprudence is clear on this point: the "federal constitutional question" is "not what the [state court] declares the meaning of the charge to be, but rather" "whether a reasonable juror could have understood" the challenged instruction in

a way that violated the defendant's jury-trial guarantee. *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985); *see also Sandstrom*, 442 U.S. at 514 ("[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."). The Washington appellate court "is not the final authority on the interpretation which a jury could have given the instruction." *Sandstrom*, 442 U.S. at 516-17. Instead, because Respondent's challenge was that the jury could have applied the accomplice-liability instruction in a way that violated his constitutional right to have every element of the charged crime submitted to the jury and proven beyond a reasonable doubt, the Ninth Circuit was correct in assessing, with reference to the trial record, whether (i) the Washington appellate court unreasonably decided the constitutional question raised, or (ii) the Washington appellate court unreasonably did not address the constitutional question at all. *See, e.g.*, *Smith v. Horn*, 120 F.3d 400, 413 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998) ("[W]here an allegedly faulty jury charge implicates a habeas petitioner's federal constitutional rights, . . . we have an independent duty to ascertain how a reasonable jury would have interpreted the instructions at issue.").

C. It Is No Answer to a Claim of Instructional Ambiguity that the Challenged Instruction Mirrored the Words of the Criminal Statute or that It Contained a Formally Correct Statement of State Law.

The foregoing discussion leads to two critical, and related, points.

First, although in many cases, instructing the jury in the bare words of a statute may be adequate, in many other cases the statutory language is not sufficient to ensure the jury's comprehension of the charged offense. Accordingly, it is no answer to a claim of instructional ambiguity that the challenged instruction tracked verbatim the words of the criminal statute. The Washington appellate court, the dissenting opinion in the Ninth Circuit, and the State have all advanced this misguided argument. *See Sarausad II v. State*, 39 P.3d 308, 313 (Wash. Ct. App. 2001) ("[T]he accomplice liability instructions here mirrored the statute and thus did not suffer from the fatal flaw in *State v. Roberts*."); *Sarausad v. Porter*, 479 F.3d 671, 707 (9th Cir. 2007) (Bybee, J., dissenting) ("There is no question that the jury in Sarausad's case was properly instructed. The instruction mimicked the statute itself."); Pet'r Br. at 27 ("The instructions mirrored the state's accomplice liability statute, differing only in using the word 'it,' while the instructions used the words 'the crime.'").

Merely because the instructions "mirrored" the text of the underlying criminal statute does not mean that the statute itself (and hence the instructions) is not reasonably susceptible of being interpreted in more than one way.[2] This purported defense of the jury instructions thus does not respond to Respondent's constitutional challenge, which is that the jury applied an incorrect interpretation of the statute in a manner that deprived him of his right to a jury determination on every element of accomplice liability under state law.

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[2] Many commentators have observed that judges often use instructions that quote verbatim from statutes—not out of any respect for defendants' constitutional rights or any desire to clarify the law—but rather to avoid reversal by appellate courts. *See* Dumas, *supra*, at 708 ("In carrying out the instructional task, . . . [t]here are subsidiary goals, in particular the goal of avoiding appellate reversal. The importance of this goal is reflected in the great reliance in most jurisdictions on pattern instructions . . . that . . . are written in the dense, complex language favored by lawyers in their written documents."); Lawrence M. Solan, *Jurors As Statutory Interpreters*, 78 Chi.-Kent L. Rev. 1281, 1305 (2003) ("[S]tatutory language can offer a safe harbor for trial courts concerned about being reversed. . . . State courts typically . . . approve instructions that track a statute's exact words, regardless of how comprehensible they are."); Tiersma, *supra*, at 1084 ("The philosophy of much of the original pattern jury instruction movement was to search for language to which a court or legislature had given its stamp of approval. . . . Copying verbatim the language of statutes—and, to a somewhat lesser extent, judicial opinions—was a virtually foolproof method of insulating the instructions from legal attack on appeal.").

Under *Estelle* and *Boyde*, the source of jury instructions (statute or otherwise) has no bearing on whether instructions are proper in a given case.

In addition, there is no requirement that Washington's accomplice-liability statute be deemed unconstitutionally vague for Respondent to obtain habeas relief, as the dissenting opinion below suggested. *Sarausad*, 479 F.3d at 711 (Bybee, J., dissenting) ("More revealing is the step the majority does not take. While claiming that the Washington statute is ambiguous, the majority stops well short of claiming that the statute is unconstitutionally vague."). It is axiomatic that criminal statutes are construed via jury instructions, and a statute may therefore be in need of clarification for the jury without being unconstitutionally vague. *See, e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (invalidating instructions that quoted terms of the state capital-sentencing statute but gave "no guidance concerning the meaning of any of [those] terms" while upholding constitutionality of the statute itself because "'this language need not be construed in this way'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 201 (1976))); *see also Virginia v. Black*, 538 U.S. 343, 376 & 377 n.5 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I am aware of no case—and the plurality cites none—in which we have facially invalidated an ambiguous statute on the basis of a constitutionally troubling jury instruction. . . . To be sure, a [constitutionally infirm] jury instruction could never support a

constitutionally valid conviction, but that is quite different from holding the ordinance to be facially invalid."); *cf. Alexander*, 643 A.2d at 1000 ("Courts commonly clarify statutory language to give more precise meaning to statutory terms to effect the legislative intent and to make sure that juries carry out that intent in determining criminal culpability.").[3]

Second, a defendant is constitutionally entitled to instructions that not only provide a formally correct statement of the law, but also convey to the jury a comprehensible substantive understanding of the applicable law. Petitioner, by failing to acknowledge this distinction, Pet'r Br. at 27-28, has confused the AEDPA-deference question.

This Court repeatedly has held that the jury's understanding of the challenged instructions is key. *Estelle*, 502 U.S. at 72; *Boyde*, 494 U.S. at 380; *Francis*, 471 U.S. at 315-16. It is not enough that a challenged instruction contained all the elements of the charged offense. Even if the instruction checked all the boxes, as it were, that does not have any bearing on the jurors' actual understanding of the law, and it is not dispositive of whether, in this case, the instructions proved unconstitutionally

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[3] *See also Godfrey*, 446 U.S. at 437 (Marshall, J., concurring) ("[I]t is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute.").

ambiguous. The Ninth Circuit therefore was not precluded from reaching the merits of Respondent's constitutional challenge. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[D]eference [under AEDPA] does not imply abandonment or abdication of judicial review.").

II. THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE INSTRUCTIONS DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A JURY DETERMINATION ON EVERY ELEMENT OF THE CHARGED OFFENSE.

The test for challenged jury instructions that mirror the text of the underlying criminal statute is therefore clear. If (i) a criminal statute is reasonably susceptible of more than one interpretation, only one of which is correct under state law, (ii) the challenged jury instruction does nothing more than mirror the words of the statute, and (iii) the defendant's challenge is that the jury applied an incorrect interpretation of the statute in a way that violated the Constitution (*e.g.*, by its not considering a required element of the crime), then a reviewing court, either on direct appeal or in habeas proceedings, must independently assess the impact of the challenged instruction on the jury. And the deference properly due under AEDPA to the state court's determination does not preclude analyzing in detail whether the state court unreasonably resolved the federal claim that the defendant's constitutional

rights were violated. At the very least, the state court here should have addressed each ground raised by Respondent.

In this case, the Ninth Circuit correctly resolved the constitutional challenge in Respondent's favor. As Petitioner repeatedly points out, the challenged jury instruction "mirrored the state's accomplice-liability statute." Pet'r Br. at 27. It is apparent that the accomplice-liability statute is reasonably susceptible of more than one interpretation, only one of which is correct under state law: Washington's courts and prosecutors for many years advanced the wrong interpretation of the statute until (and even after) the Washington Supreme Court clarified the law.[4] *See State v. Cronin*, 14 P.3d 752, 757 (Wash. 2000) (en banc); *State v. Roberts*, 14 P.3d 713, 734-36 (Wash. 2000) (en banc); *see also State v. Shott*, No. 54359-8-I, 2006 Wash. App. LEXIS 1033, at *11 (May 22, 2006); *State v. Wolff*, No. 30381-1-II, 2005 Wash. App. LEXIS 517, at *10 (Mar. 30, 2005). Indeed, on direct appeal in Respondent's case, the state court applied the wrong interpretation of the statute and concluded that knowledge of a potential homicide was not a required element. *Sarausad II*, 39 P.3d at 315. If judges and prosecutors, well-versed in

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[4] Ironically, it is Petitioner's argument to the contrary—not the Ninth Circuit's opinion— that "'fails to give proper deference to state courts,'" Pet'r Br. at 24, because it suggests that Washington's courts for many years adopted an objectively unreasonable interpretation of the accomplice-liability statute.

interpreting the state's criminal statutes, could repeatedly misconstrue the law, plainly a lay jury could adopt the same incorrect understanding of accomplice liability.[5]

Constitutional errors in jury instructions that quote verbatim from criminal statutes likely will arise in only a small number of cases. *See Neder*, 527 U.S. at 39 (Scalia, J., concurring in part and dissenting in part) ("I doubt that the criminal cases in which instructions omit or misdescribe elements of the offense over the objection of the defendant are so numerous as to present a massive problem. (If they are, the problem of vagueness in our criminal laws, or of incompetence in our judges, makes the problem under discussion here seem insignificant by

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[5] Tellingly, other state courts have interpreted materially indistinguishable statutory language not to require that an accomplice have knowledge of the specific crime the principal is charged with. For example, Colorado's accomplice liability statute provides: "A person is legally accountable as a principal for the behavior of another constituting a criminal offense if, with the intent to promote to facilitate the commission of the offense, he aids, abets or advises the other person in planning or committing the offense." Colo. Rev. Stat. § 18-1-603 (1986) (emphasis added). In *People v. Wheeler*, 772 P.2d 101, 103-04 (Colo. 1989) (en banc), the Colorado Supreme Court held that "[t]his language only requires knowledge by the complicitor that the principal is engaging in, or about to engage in, criminal conduct"—an interpretation identical to the incorrect view of accomplice liability that was rejected by the Washington Supreme Court. It is at least reasonable that a lay jury, when presented with the bare words of a materially identical statute, could adopt a similar (and incorrect) understanding of Washington accomplice-liability law.

comparison.)"). This limited set of cases nevertheless represents "the occasional abuse that the federal writ of habeas corpus stands ready to correct." *Jackson v. Virginia*, 443 U.S. 307, 322 (1979).

The accomplice-liability law applicable to Respondent's case did not change with the *Cronin* and *Roberts* decisions. The Washington Supreme Court merely clarified the statute. *In re Domingo*, 119 P.3d 816 819-21 (Wash. 2005). Washington law has always required, as an element of accomplice liability, that an accomplice must have "knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged." *Cronin*, 14 P.3d at 757. Under clearly established federal law, as determined by this Court, that element must have been understood, and found by, the jury beyond a reasonable doubt. *Booker*, 543 U.S. at 230; *Apprendi*, 530 U.S. at 477; *Neder*, 527 U.S. at 12; *Gaudin*, 515 U.S. at 510; *In re Winship*, 397 U.S. at 364.[6] Although "States possess primary authority for defining and enforcing the criminal

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[6] Petitioner's suggestion that this rule is not clearly established has no merit. *See* Pet'r Br. at 39 ("Under the Court's holdings, the state court could reasonably conclude the instructions correctly setting forth state law did not violate due process by relieving the State of the burden of proof. The instructions did not omit an element of the offense, did not create a presumption of fact, and did not shift the burden of proof to the defendant."). Petitioner's unduly narrow reading of the Court's previous decisions effectively writes Respondent's constitutional jury-trial guarantee out of this case altogether.

law," Pet'r Br. at 30, "once the state has defined the elements of an offense, the federal Constitution imposes constraints upon the state's authority to convict a person of that offense." *Horn*, 120 F.3d at 415.[7]

It is true that relief is available under AEDPA only if the state court unreasonably applied federal law to Respondent's case. *See* Pet'r Br. at 24. But the record here indicates that the Washington Court of Appeals' decision on Respondent's personal restraint petition ("PRP") was, in fact, objectively unreasonable. The PRP panel should have assessed whether there is a reasonable likelihood that the jury, at the time of the trial, believed it could convict Respondent without finding that he had knowledge of a potential homicide. If so, then the instructions unconstitutionally omitted or misdescribed one of the elements of accomplice liability under state law.

Given the pin-balling in Washington's courts on the definition of accomplice liability, the PRP panel was well aware that the statute requires a jury finding that Respondent had knowledge of a potential homicide. Petitioner's protestations to the contrary notwithstanding, the PRP panel was also "on notice," Pet'r Br. at 39-40, as surely every court

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[7] Petitioner's argument—that "'[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation,'" Pet'r Br. at 37—is unhelpful because the jury-trial guarantee does appear in the Bill of Rights: in the Sixth Amendment. *See* pp. 2-3, *supra*.

in the country is, that the Constitution requires every element of a charged crime to be submitted to a jury. When confronted with Respondent's argument that the jury did not find the "knowledge" element, the PRP panel should therefore have examined, in the totality of circumstances, whether the instructions created a reasonable likelihood that the jury misunderstood the "knowledge" element of accomplice liability.

Instead, the PRP panel cut off its inquiry too soon. Once the panel had concluded that the accomplice-liability instruction was "sufficient" because it copied the words of the statute and had been approved by appellate courts as a correct statement of the law, it substantially failed to address any of Respondent's arguments that the jury was hopelessly confused. *See Sarausad II*, 39 P.3d at 316-17 ("whatever the basis for the jury's confusion may have been, the accomplice liability instructions were sufficient"). That, in itself, was a violation of clearly established federal law under *Estelle* and *Boyde* because the PRP panel did not conduct the necessary constitutional inquiry.

Respondent pointed out that the jury had asked about the *mens rea* component of accomplice liability three separate times—including after it had already deliberated for seven days. Each time, the judge merely referred the jurors back to the same instructions that had them confused in the first place. The PRP panel did not assess whether the judge's responses were adequate to inform the jury

that it must find the "knowledge" element of accomplice liability.[8] These repeated questions, in the face of a statute so ambiguous that state courts interpreted it wrongly for over fifteen years (including in Respondent's own appeal), required more of a constitutional inquiry than the panel made. It was unreasonable for the PRP panel not to consider whether the jurors' confusion about a required element of the charged crime had, in fact, been eliminated by the trial judge's responses.

To the extent the PRP panel addressed any of Respondent's claims, it focused only on his argument that the prosecutor forcefully advanced the wrong interpretation of the law during her closing statement. *See Sarausad II*, 39 P.3d at 316-19. The panel concluded that she had not. *Id.* at 319. But this partial analysis of the record is neither constitutionally sufficient, nor reasonable, under *Estelle* and *Boyde*. Whether or not the prosecutor's closing argument was a contributing factor, the jury was obviously confused about the *mens rea* for accomplice liability during its deliberations: It asked three times for clarification. It was not enough for the PRP panel to state that in its view, "whatever the basis for the jury's confusion may have been, the

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[8] The PRP panel acknowledged that the jury asked these three questions, which were "essentially the same," but never explained why it had concluded that the jurors' apparent confusion as to accomplice liability had been eliminated by the time of the verdict. *See Sarausad II*, 39 P.3d at 316-17. The panel's decision is not entitled to deference on a question it did not decide. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

accomplice liability instructions were sufficient," *id.*, without also examining whether that confusion had been eliminated by the time of the verdict. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (holding that state court's analysis was "objectively unreasonable" where it "did not conduct an assessment" of petitioner's claim that counsel's investigation was adequate, but "merely assumed" that it was). Because of the reasonable likelihood that this confusion persisted, the Ninth Circuit correctly concluded that Respondent is entitled to habeas relief.

CONCLUSION

For the foregoing reasons, amicus curiae National Association of Criminal Defense Lawyers supports Respondent Sarausad's request that this Court affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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